FILED
MAY 19 1972
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1513

ANTHONY JOSEPH RUSSO, JR.,
*Petitioner,*

*v.*

HON. WM. MATTHEW BYRNE, JR.,
United States District Judge for the
Central District of California,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES REIF,
c/o Center for Constitutional Rights,
588 Ninth Avenue,
New York, New York 10036,

LEONARD I. WEINGLASS,
108 Washington Street,
Newark, New Jersey 07102,

JEFFREY B. KUPERS,
619 South Bonnie Brae Street,
Los Angeles, California 90057,

H. PETER YOUNG,
1532 Third Street,
Santa Monica, California 90401,

ARTHUR KINOY,
c/o Center for Constitutional Rights,
588 Ninth Avenue,
New York, New York 10036,

*Attorneys for Petitioner.*

Adams Press Corp., 130 Cedar Street, N. Y.—Beekman 3-1060-61

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| STATUTORY PROVISION INVOLVED | 2 |
| STATEMENT OF THE CASE | 4 |
| REASONS FOR GRANTING THE WRIT | 14 |
| I—The Unprecedented Facts of the Instant Case Present An Issue of Substantial Importance Which Should Be Resolved By This Court | 14 |
| II—The Conduct of the Government in This Case and the Failure of the Lower Courts to Disapprove It Are Fundamentally At Odds With Title 18 U.S.C. Section 2514 and With the Federal Supervisory Power | 20 |
| III—In View of the Extraordinary Circumstances Here Presented, Mandamus Is An Appropriate Remedy | 40 |
| CONCLUSION | 50 |
| APPENDIX: | |
| A—Order of Court of Appeals for the Ninth Circuit | 51 |
| B—Oral Opinion of the United States District Court for the Central District of California | 52 |

PAGE

C—Opinion in *In re Russo,* Misc. No. 1821 (C.D.Cal., 1971) ..... 55

D—Counts 1, 7, 10 and 15 in Indictment in *United States* v. *Anthony Joseph Russo, Jr. and Daniel Ellsberg,* No. 9373 (C.D.Cal.) 74

E—Cases Since December, 1970 Involving Government Use of 18 U.S.C. Section 2514 ..... 84

**Cases Cited**

Accardi v. United States, 257 F.2d 168 (5 Cir.), cert. den. 358 U.S. 883 (1958) ..... 32

Application of United Electrical, Radio & Machine Workers, 111 F.Supp. 858 (S.D.N.Y., 1953) ..... 33

Baggett v. Bullitt, 377 U.S. 360 (1964) ..... 47

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953) ..... 48

Carbajal-Portillo v. United States, 396 F.2d 944 (9 Cir., 1968) ..... 32

Cramp v. Board of Public Instruction, 368 U.S. 278 (1961) ..... 47

Dilworth v. Riner, 343 F.2d 226 (5 Cir., 1965) ..... 46

Dixon v. District of Columbia, 394 F.2d 966 (D.C. Cir., 1968) ..... 33, 34

Dombrowski v. Pfister, 380 U.S. 479 (1965) ..... 46, 47

Duncan v. Perez, 445 F.2d 551 (5 Cir.), cert. den. 404 U.S. 940 (1971) ..... 34

Ex parte Bain, 121 U.S. 1 (1887) ..... 29

Ex parte Baldwin, 291 U.S. 610 (1934) ..... 45

PAGE

Ex parte Fahey, 332 U.S. 258 (1947) ..... 45

Ex parte Peru, 318 U.S. 578 (1943) ..... 41, 42, 45

Ex parte Skinner & Eddy, 265 U.S. 86 (1924) ..... 47, 48

Ex parte United States, 287 U.S. 241 (1932) ..... 41

Gelbard & Parnas v. United States, No. 71-110 ..... 15

Georgia v. Rachel, 384 U.S. 780 (1966) ..... 46

Gravel v. United States, No. 71-1017 ..... 15

Greene v. United States, 454 F.2d 783 (9 Cir., 1971) 32

Gulf Research & Development Co. v. Harrison, 185 F.2d 457 (9 Cir., 1950) ..... 48

Hale v. Henkel, 201 U.S. 43 (1906) ..... 30, 31, 44-45, 50

Heike v. United States, 227 U.S. 131 (1913) ..... 38

In re Bart, 304 F.2d 631 (D.C.Cir., 1962) ..... 20, 26

In re Begley, No. 71-1708 (2 Cir., 1971) ..... 21, 22

In re Bottari, 453 F.2d 370 (1 Cir., 1972) ..... 35

In re Dionisio, 442 F.2d 276 (7 Cir., 1971) ..... 27

In re Evans, 452 F.2d 1239 (D.C. Cir., 1971) ..... 20-21, 22, 26

In re Flanagan, 350 F.2d 746 (D.C.Cir., 1965) ..... 43

In re Grand Jury Subpoena, 225 F.Supp. 923 (N.D. Ill., 1964) ..... 29

In re Josephson, 218 F.2d 714 (1 Cir., 1954) ..... 41

In re Kelley, et al., Misc. No. 71-128 (E.D.Mich., 1971) ..... 29

In re Russo, Misc. No. 1821 (C.D.Cal., 1971) ..... 12, 36

In re Russo, 448 F.2d 369 (9 Cir., 1971) ..... 7

PAGE

In re September 1971 Grand Jury, 454 F.2d 580 (7 Cir., 1971) ..... 27

In re Vericker, 446 F.2d 244 (2 Cir., 1971) ..... 20, 21, 22

In re Webb, No. 72-1782 (9 Cir.) (pending) ..... 22

In the Matter of Motion for Order Quashing Grand Jury Subpoena, Misc. Cr. No. 2920 (C.D.Cal., 1971) ..... 30

Kastigar v. United States, No. 70-117 ..... 15

LaBuy v. Howes Leather Co., 352 U.S. 249 (1957) ..... 40, 41; 42, 44, 48

Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947) ..... 18

Lumber Products Assn. v. United States, 144 F.2d 546 (9 Cir., 1944) ..... 38

Marcus v. United States, 310 F.2d 143 (3 Cir., 1962), cert. den. 372 U.S. 944 (1963) ..... 43

McDonald v. Musick, 425 F.2d 373 (9 Cir., 1970) ..... 34

NAACP v. Button, 371 U.S. 415 (1963) ..... 47

New York Times Co. v. United States, 403 U.S. 713 (1971) ..... 47

Piccirillo v. New York, 400 U.S. 548 (1971) ..... 38

Russo v. United States, 404 U.S. 1209 (1971) ..... 7

Schlagenhauf v. Holder, 379 U.S. 104 (1964) ..... 42, 43, 48

Shapiro v. Bonanza Hotel Co., 185 F.2d 777 (9 Cir., 1950) ..... 42

Sherman v. United States, 356 U.S. 369 (1958) ..... 31, 32

Smith v. California, 361 U.S. 147 (1960) ..... 47

PAGE

Sorrells v. United States, 287 U.S. 435 (1932) ..... 31, 32

Stanley v. Georgia, 394 U.S. 557 (1969) ..... 47

United States v. Ahmad, et al., Crim. No. 14950 (M.D.Pa.) ..... 19

United States v. Caldwell, No. 70-57 ..... 15

United States v. DiMauro, 441 F.2d 428 (8 Cir., 1971) ..... 21, 26, 27

United States v. Doe, 72 Cr. Misc. 1 (S.D.N.Y., 1972) 28

United States v. Egan, No. 71-263 ..... 15

United States v. Fisher, 455 F.2d 1101 (2 Cir., 1972) 29

United States v. Gravel, No. 71-1026 ..... 15

United States v. McLeod, 385 F.2d 734 (5 Cir., 1967) 34

United States v. Monia, 317 U.S. 424 (1943) ..... 27, 36

United States v. Morrison, 348 F.2d 1003 (2 Cir., 1965) ..... 32

United States v. New York Times Co., 444 F.2d 544 (2 Cir., 1971) ..... 23

United States v. Anthony Joseph Russo, Jr. and Daniel Ellsberg, No. 9373 (C.D.Cal.) ..... 12, 13

United States v. Ryan, 455 F.2d 728 (9 Cir., 1971) ..... 28, 30

United States v. Smyth, 104 F.Supp. 283 (N.D.Cal., 1952) ..... 33, 45

United States v. Spock, 416 F.2d 165 (1 Cir., 1969) ..... 47

United States v. United States District Court, 444 F.2d 651 (6 Cir.), cert. granted 29 L.Ed. 2d 708 (1971) ..... 42, 43, 49

PAGE

United States v. Washington Post, 446 F.2d 1327 (D.C.Cir., 1971) ..... 23

United States v. Weinberg, 439 F.2d 743 (9 Cir., 1971) ..... 21

United States v. Weinstein, 452 F.2d 704 (2 Cir., 1971) ..... 41

United States Alkali Export Assn. v. United States, 325 U.S. 196 (1945) ..... 48

Walker v. Birmingham, 388 U.S. 307 (1967) ..... 35

Will v. United States, 389 U.S. 90 (1967) ..... 43-44

Wood v. Georgia, 370 U.S. 375 (1962) ..... 29

**United States Constitution Cited**

First Amendment ..... 46, 47

Fifth Amendment ..... 3, 24, 25, 36, 37

**Statutes Cited**

18 U.S.C.:

Section 371 ..... 12, 13, 38

Section 641 ..... 7, 12, 13, 38, 39

Sections 792-799 ..... 39

Section 793 ..... 7, 12, 13, 38, 39, et passim

Section 2153 ..... 22

Section 2514 ..... 2-3, 5, 7, 14, 19, et passim

Section 2516 ..... 22

Section 3331 ..... 4, 14

Section 3486 ..... 19, 20

PAGE

28 U.S.C.:

Section 1254(1) ..... 2

Section 1291 ..... 45

Section 1651 ..... 40, 41

Section 1826 ..... 7, 14

Civil Rights Act of 1964 ..... 46

Section 13 of the Judiciary Act of 1789 ..... 41

Section 234 of the Judicial Code of 1911 ..... 41

Section 262 of the Judicial Code of 1911 ..... 41

Title 18, Chapter 37 of the United States Code ..... 5

**Rule Cited**

Federal Rules of Criminal Procedure, Rule 6(e) ..... 35

**Other Authorities Cited**

Diamond, "Fishing In Ellsberg's Wake," More (A Journalism Review), January, 1972, pp. 1, 13-16 18

Donner & Cerruti, "The Grand Jury Network," The Nation, January 3, 1972, pp. 5-20 ..... 18

"The Federal Witness Immunity Acts In Theory And Practice: Treading the Constitutional Tightrope," 72 Yale L.J. 1568 (1963) ..... 19

Hearings Before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 92nd Cong., 1st Sess., November 10, 1971 ..... 15-16, 17

H.R. Rep. No. 2606, 83d Cong., 2d Sess. in 2 U.S. Code Cong. & Admin. News, 83d Cong., 2d Sess., 1954, p. 3062 et seq. ..... 20

PAGE

Kaufman, "The Grand Jury—Its Role And Its Powers," 17 F.R.D. 331 (1954) ..... 28

Pentagon Papers (a/k/a "History of U.S. Decision-Making on Viet Nam Policy") ..... 4, 23, 39

R.T. Misc. No. 2832—(WG), June 23, 25 and July 2, 1971 ..... 6

R.T. Misc. No. 2832—(WF), October 1, 1971 ..... 8-10

R.T. No. 9373—(WMB), January 28, 1972 ..... 4

Tigar and Levy, "The Grand Jury As The New Inquisition," 50 Michigan State Bar Journal 693 (November, 1971) ..... 18

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. [redacted]

ANTHONY JOSEPH RUSSO, JR.,
*Petitioner,*

*v.*

HON. WM. MATTHEW BYRNE, JR.,
United States District Judge for the
Central District of California,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Anthony Joseph Russo, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 9, 1972.

## Opinions Below

The order of the Court of Appeals, see Appendix A, at p. 51, *infra*, was entered without opinion. The brief oral opinion of the United States District Court for the Central District of California appears in Appendix B, at pp. 52 *et seq.*

## Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 9, 1972, and this petition has been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

## Questions Presented

1. Whether a federal grand jury witness, ready, willing and able to testify pursuant to 18 U.S.C. §2514 after being ordered to give evidence by the District Court upon application of the government, and upon such terms as the Court has found lawful and reasonable and from which the government has not appealed, who is precluded from testifying solely because the government attorney refuses to allow him to due to his opposition to those lawful and reasonable terms, which opposition is not shared by the grand jury itself, is entitled, pursuant to 18 U.S.C. Section 2514 and the federal supervisory power, to the full transactional immunity he would have received had he been allowed to testify?

2. Whether the immunity to which petitioner is entitled includes immunity from prosecution of the pending indictment?

3. Whether, in view of the extraordinary circumstances here presented, mandamus is a necessary or appropriate remedy?

## Statutory Provision Involved

United States Code, Title 18:

§2514. Immunity of witnesses

Whenever in the judgment of a United States attorney the testimony of any witness, or the pro-

duction of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

Added Pub. L. 90-351, Title III, §802, June 19, 1968, 82 Stat. 216.

## Statement of the Case

On June 13, 1971, the *New York Times* began publication of investigative reports allegedly based upon and containing parts of the so-called Pentagon Papers (a/k/a "History of U. S. Decision-Making Process on Viet Nam Policy"). Shortly thereafter the *Washington Post* and other newspapers throughout the United States commenced publication of investigative accounts also alleged to have been based upon the Pentagon Papers. Sometime after June 13 but before June 23, the United States caused a special grand jury to be convened, see 18 U.S.C. §3331, in the Central District of California to investigate possible violation of federal law in connection with the Pentagon Papers.

On Tuesday, June 22, petitioner Anthony Russo was served by the F.B.I. with a subpoena which sought to compel his appearance before this grand jury the following morning. On June 23, petitioner, in compliance with the subpoena, appeared before the grand jury where, after being sworn, he was asked: "Did you have anything to do with the Pentagon Papers and/or Daniel Ellsberg and the copying of these papers?" Petitioner declined to answer this question upon the ground that it violated his Fifth Amendment privilege against self-incrimination.[1]

Without more petitioner was then instructed to and did appear forthwith before the District Court, Hon. Wil-

---

[1] The government never formally put this question on the record of any proceeding. However, on January 28, 1972, at the hearing on petitioner's motion to dismiss the indictment, counsel for petitioner represented to the District Court that this question was asked of Mr. Russo. Counsel for the government did not dispute the accuracy of that representation, even after counsel for petitioner invited him to, if he so choose. Reporter's Transcript (hereinafter "R.T.") No. 9373-(WMB), January 28, 1972, p. 12.

liam P. Gray, at 11:45 A.M. The government thereupon moved the District Court for an order directing petitioner not to invoke the privilege against self-incrimination in refusing to answer questions before the grand jury. The government made no claim that answers to the questions would not tend to incriminate petitioner; it applied for the order pursuant to 18 U.S.C. §2514, which provides for transactional immunity.[2] The government's moving papers included: (a) an application for immunity alleging *inter alia* that the grand jury was "inquiring into alleged violations of Chapter 37 of Title 18 of the United States Code" and that the application was being made "in good faith, with the approval of the Attorney General of the United States, by the United States Attorney, in whose judgment the testimony of Anthony Russo, Jr., is necessary to the public interest;" and (b) an affidavit by Robert L. Meyer, then United States Attorney for the Central District of California, stating *inter alia* that the application was being made "in good faith with the approval of the Attorney General of the United States." No letter of approval from the Attorney General or from a properly designated subordinate in the Department of Justice was included in the moving papers.

After a brief hearing Judge Gray signed an order submitted by the government requiring petitioner to "appear forthwith before the grand jury and testify and produce evidence with respect to all matters under inquiry by the grand jury." Counsel for petitioner was given 2 days in which to prepare argument challenging the lawfulness of the government's application and the court's order.

Petitioner thereupon returned to the grand jury that same day, June 23, where he was asked the following questions:

---

[2] See pp. 2-3, *supra*.

"Q. Let me ask you this question, Mr. Russo: Do you know an individual by the name of Daniel Ellsberg?"

"Q. Did you, Mr. Russo, work for the Rand Corporation at any time?"

"Q. Do you know, Mr. Russo, whether Daniel Ellsberg ever worked for the Rand Corporation?"

"Q. Mr. Russo, let me ask you: I assume, but I would like you to tell me that your attorney—that you have consulted with your attorney and that he has advised you of the penalties if a witness, after having been granted immunity, refuses to answer any questions on the grounds of self-incrimination. Has your attorney advised you of that right?"

"Q. Did you ever, Mr. Russo, meet with a Daniel Ellsberg outside of the physical property of the Rand Corporation in Santa Monica, California?"

"Q. Did you, Mr. Russo, ever travel with Daniel Ellsberg or meet with him at the office of an advertising agency which was owned and operated or occupied by a Miss Linda Sinay?"

"Q. Do you do Linda Sinay?"

"Q. Did you at any time within the past few years, Mr. Russo, see any documents classified top secret in the possession of Daniel Ellsberg?"

"Q. Did you actually observe, Mr. Russo, Daniel Ellsberg make or cause to be made copies of top secret documents at any time?"

"Q. Who, Mr. Russo, was present in addition to yourself when you observed Daniel Ellsberg making copies of classified documents?"

"Q. Can you tell us how many copies were made?"

"Q. Did you yourself observe anyone making copies of classified documents?"[3]

---

[3] R.T., Misc. No. 2832-(WG), June 23, 25 and July 2, 1971, pp. 81-84.

Petitioner declined to answer each of these questions.

On Friday, June 25, Judge Gray rejected arguments on behalf of petitioner challenging the government's application and the order of June 23 and reaffirmed that order. The court also set July 2 as the date for hearing the government's oral application to hold petitioner in civil contempt for refusal to testify before the grand jury pursuant to §2514. On the same day, the grand jury returned an indictment charging Daniel Ellsberg with violation of 18 U.S.C. §§641 and 793. Petitioner was not named in the indictment.

On July 2, petitioner was held in civil contempt under 28 U.S.C. §1826(a)2 for his refusal to testify before the grand jury. A notice of appeal was filed that same day and execution of judgment was stayed by the District Court until July 7. On August 2, the Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court holding petitioner in contempt. (The opinion of the Court of Appeals supporting its affirmance was filed August 17). *In re Russo,* 448 F. 2d 369 (9 Cir., 1971). When an application for a stay of the mandate of the Court of Appeals was denied by Justice Douglas, as Circuit Justice, on August 16, *Russo* v. *United States,* 404 U. S. 1209 (1971), petitioner was committed to custody.

On September 27, 1971, after being in jail for forty-two (42) days, petitioner decided to testify. He thereupon filed a motion in the District Court for an order requiring the government:

> "1) To provide the services of a stenographer to be present at and to record and transcribe all matters occurring before said Grand Jury while Anthony Russo, Jr., is before said Grand Jury;
>
> 2) To provide a copy of the complete written transcription of all of said matters to Anthony

Russo, Jr., within 24 hours after each appearance of Anthony Russo, Jr., before said Grand Jury;

3) To refrain from taking any action whatsoever against Anthony Russo, Jr., on account of any disclosure that Anthony Russo, Jr., may make subsequent to his appearance before said Grand Jury regarding any matters which may occur in Anthony Russo, Jr.'s presence before said Grand Jury."

At the hearing on the motion before the Hon. Warren J. Ferguson on October 1, 1971, at which petitioner was present, the following colloquy occurred:

"The Court: Will Mr. Russo purge himself of contempt if orders are made, Mr. Balaban?

Mr. Balaban: I believe that question would best be answered by Mr. Russo, your Honor. He is present.

The Court: Mr. Russo.

Mr. Russo: Thank you, your Honor.

The Court: Just a yes or no. I would appreciate it.

Mr. Russo: Your Honor, if the motions are granted, my position is the same as it always has been. If the motions are granted, I will testify and will answer all relevant questions, yes, your Honor.

The Court: All right."[4]

At the conclusion of the hearing, the Court entered the following order:

"Therefore, it will be the order of this court that if on October 18, 1971, the witness, Anthony Russo,

---

[4] R.T. Misc. No. 2832-(WF), October 1, 1971, p. 11, line 14 through p. 12, line 1.

Jr., appears before a duly constituted Grand Jury of this court on October 18, 1971, at 10:00 A.M., and there answer any and all questions which may be put to him by the attorney for the Government, he will have purged himself of contempt of court on the condition further that the Government (1) provide the services of a stenographer to be present and to record and transcribe all matters occurring before said Grand Jury while Anthony Russo, Jr., is before said Grand Jury;

Secondly, the Government shall furnish to the witness one copy of a complete written transcript of all matters which occur in the Grand Jury room while the witness, Anthony Russo, Jr., is testifying; said transcript to be furnished no later than 36 hours—24 hours, you know, I haven't the faintest idea, Mr. Balaban, if they can get it out in 24 hours or not, but 36 hours ought to be an adequate period of time.

Then, secondly, the court finds and permits the witness, first of all, to disclose to anyone he wants to any matters which may occur in Anthony J. Russo's presence before the Grand Jury; provided, however, Mr. Balaban, that the court wants no commercialization of the transcript. So any disclosure to anybody will be an oral disclosure by Mr. Russo and will not be copies of the transcript, serialized, published, or copies made.

Is that agreeable?

Mr. Balaban: Your Honor, I would agree that it would be inappropriate to commercialize. However, I think the order is somewhat restricted. What if Mr. Russo wants to discuss and show his copy to other people, I think that that would be within his right to disclose.

I would stipulate that Mr. Russo will be able to show the transcript to whomever he pleases. The original will always be maintained in his possession and no copies will be made, no photocopies or anything like that will be made from his copy.

Of course, I assume, your Honor, that I will also be allowed to keep it in my possession.

The Court: Of course, there is no restriction on you or Mr. Russo, but no copies, either photographic, printed, or handwritten, Mr. Balaban.

Mr. Balaban: That is acceptable, your Honor.

The Court: All right.

Pending the purging of the contempt of court, which has been heretofore issued, Mr. Russo will be released from custody on his own recognizance pending his appearance before the Grand Jury on October 18, 1971, at 10:00 A.M."[5]

By the time of his release on October 1, petitioner had spent forty-six (46) days in jail.

On or about October 5, the government served upon petitioner a document entitled "Notice" stating that it would refuse "to furnish him a copy of the transcript of proceedings of his appearance before the Grand Jury on October 18, 1971, on the ground that the order requiring such transcript to be furnished him is unlawful and made without and beyond the authority of the Court." At the time this Notice was served and the statements therein made, the government had taken no appeal from the District Court's order of October 1.

---

[5] R.T. Misc. No. 2832-(WF), October 1, 1971, p. 14, line 9, through p. 16, line 9.

On October 18, 1971, petitioner appeared outside the grand jury room at approximately 10 A.M. ready, willing and able to testify pursuant to the conditions approved by the District Court in its ruling of October 1. However, Mr. Russo was thereupon informed by David R. Nissen, the attorney for the United States, that he would allow petitioner to testify if he agreed to do so without a transcript but would refuse to do so under the terms approved by the District Court. This was solely because the order of the District Court was, according to Mr. Nissen, "an unlawful order." When asked by petitioner why he was violating the order of Judge Ferguson, Mr. Nissen replied: "I don't consider it a violation of a lawful court order."[6] When Mr. Russo attempted to ask Mrs. Patricia L. Jones, the forewoman of the grand jury, who was present at the request of petitioner's counsel, whether the grand jury approved of Mr. Nissen's position, he was told by Mr. Nissen, without consulting the forewoman: "Mrs. Jones is not going to answer any questions."[7] The decision not to allow petitioner to testify before the grand jury upon the condition that he be furnished with a copy of the transcript of his testimony was thus made solely by the government attorney without any consultation with or agreement by the grand jury. All this was done although the government had not appealed the District Court's order of October 1.

The respective parties thereupon appeared before the District Court (Judge Ferguson) and Mr. Nissen moved the Court on behalf of the government to vacate its order permitting petitioner to testify upon the aforementioned condition and inquired whether the Court would require

---

[6] Affidavit of Genevra Kay Loveland, secretary to petitioner's former counsel, submitted in the District Court.

[7] *Id.*

Mr. Russo to appear if the government refused to provide him with said transcript. Counsel for petitioner asked the Court to purge Mr. Russo of contempt based upon the U. S. attorney's failure to satisfy the condition approved by the Court. The matter was taken under submission, and subsequently, both parties submitted briefs upon invitation of the Court.

On November 17, 1971, the District Court filed its memorandum opinion and order. The Court reaffirmed its order conditioning petitioner's testifying upon his receiving a transcript and further held that in light of petitioner's readiness and willingness to testify and the U. S. attorney's refusal to provide petitioner with the transcript, Mr. Russo was to be deemed to have purged himself of contempt. *In re Russo*, Misc. No. 1821-(WF) (C. D. Cal., Nov. 17, 1971).[8]

On December 29, 1971, the grand jury returned an indictment superseding the one it had returned on June 25. In addition to charging Daniel Ellsberg with various crimes, this second indictment also accused petitioner of violation of 18 U. S. C. §§371, 641, 793(c) and 793(e).[9] The trial of this indictment, *United States* v. *Anthony Joseph Russo Jr. and Daniel Ellsberg*, No. 9373 (C. D. Cal.), was assigned to respondent, Hon. Wm. Matthew Byrne, Jr.

Also on December 29, the government filed a notice of appeal from the District Court's rulings of October 1 and November 17. This appeal, however, was never perfected.

---

[8] This order and opinion are as yet unreported. Because of their importance to an understanding of the instant application, we have included them in Appendix C, pp. 55 *et seq.*

[9] These were counts 1, 7, 10 and 15 of the indictment, included in Appendix D, pp. 74 *et seq.*

On January 14, 1972, petitioner moved the District Court for an order dismissing the charges against him on the ground that the prosecution was for alleged transactions for which petitioner had received immunity. On January 28, respondent denied said motion.

On May 3, petitioner filed in the United States Court of Appeals for the Ninth Circuit, with a motion to expedite consideration thereof, an application for a writ of mandamus directing respondent, Hon. Wm. Matthew Byrne, Jr., to dismiss that part of the indictment in *United States v. Anthony Joseph Russo, Jr. and Daniel Ellsberg*, No. 9373 (C. D. Cal.) which charges petitioner with violations of 18 U.S.C. §§371, 641, 793(c) and 793(e), on the ground that Mr. Russo was immune from prosecution of those charges.[10] After submission of briefs by petitioner and by the United States but without oral argument, the Court of Appeals entered its order denying the petition for writ of mandamus. It is that order which petitioner asks this Court to review.

---

[10] The interval between the ruling of the District Court and the filing of the petition for writ of mandamus resulted from the complete change in petitioner's counsel and the extraordinary amount of pre-trial work involved in preparing the case in *United States* v. *Russo and Ellsberg, op. cit.*

## *REASONS FOR GRANTING THE WRIT*

### I

### The unprecedented facts of the instant case present an issue of substantial importance which should be resolved by this Court.

This case arises in the midst of the controversy currently raging over the government's use of the grand jury. In the last year and a half more than a dozen special grand juries[11] have been initiated by the Department of Justice around the country, each purportedly investigating anti-war activity. These proceedings are conducted not by local United States attorneys as is the usual case but by personnel assigned to the Internal Security Division of the Department of Justice. This broad use of the grand jury has resulted in an enormous increase in the amount of litigation surrounding persons whom the government has sought to compel to testify before grand juries.[12]

---

[11] Under 18 U.S.C. § 3331, effective October 15, 1970, a "special grand jury" can be convened to sit for eighteen months and, upon extension, up to thirty-six months. This compares with general grand juries which sit for periods varying from district to district but for not more than six months. Because a person who faces incarceration for refusal to testify may be sentenced pursuant to a judgment of civil contempt for the life of the grand jury, see 28 U.S.C. § 1826, a person subpoenaed before a special grand jury is faced with considerably longer potential imprisonment.

[12] At p. 19, *infra*, we refer to 65 instances since December 1970, where the government has sought to use Title 18 U.S.C. Section 2514. Counsel are also aware of 52 other cases since that time involving witnesses before federal grand juries, which do not involve Section 2514. These cases have raised a host of issues concerning the lawfulness of government conduct in the grand jury room.

*(Footnote continued on following page)*

This signal increase in government use of the grand jury has not escaped the attention of Congress. On November 10, 1971, during a hearing before a subcommittee of the House Judiciary Committee, Harlington Wood, Jr., Associate Deputy Attorney General, was testifying on behalf of the Department of Justice in regard to pending legislation. During the course of his testimony, the following colloquy occurred:

> Chairman Celler: Can you tell the committee if there exists today, in the Department of Justice, any written guidelines to govern the nature and the scope of grand jury investigations?
>
> Mr. Wood: Governing the scope of grand jury investigations?
>
> Chairman Celler: The scope of grand jury investigations and their nature.
>
> I will tell you why I ask the question. Of late there has been much in the press, and other media, concerning the grand jury process. There has been specific criticism concerning grand jury proceedings in Los Angeles and in Boston, with respect to the Pentagon Papers, for example. In addition, there are approximately, as I understand it, some 10 separate grand jury panels in various parts of the country, for example, in Detroit, Seattle, New York, and Harrisburg, all investigating antiwar activities.

---

*(Footnote continued from preceding page)*

There are presently pending before this Court five cases involving the rights of witnesses before federal grand juries. *United States* v. *Egan*, No. 71-263; *Gelbard and Parnas* v. *United States*, No. 71-110; *United States* v. *Caldwell*, No. 70-57; *Kastigar* v. *United States*, No. 70-117; *Gravel* v. *United States* and *United States* v. *Gravel*, Nos. 71-1017 and 71-1026. This represents a greater number of such cases in one term than the Court has had in the last twenty years combined.

I ask, are there in existence in the Department of Justice any written guidelines governing the nature and the scope of such grand jury investigations?

Mr. Wood: Mr. Chairman, personally, I am aware of no written guidelines, generally applying, as you inquire.

I think it is a matter which has been handled in the discretion of the grand jury itself and the prosecutor, and limited by the courts.

Chairman Celler: There is no direction, no center of direction, no central guidelines at all?

Mr. Wood: I do not know of any written guidelines, but certainly an official in the Department of Justice would be giving the matter consideration, and injecting his own discretion and judgment into the matter, subject to what the court may limit it to, but I do not know of any written guidelines.

Chairman Celler: Will you find out and let us know if there are any such guidelines?

Mr. Wood: I shall do so.

Chairman Celler: And, finally what rules or standards do you know of that govern the prosecutor in the course of a grand jury investigation; for example, whether or not to grant immunity and the scope of such grant? Are there any standards that prevail that govern prosecutors in the various districts?

Mr. Wood: I believe we do have some written guidelines on the application of the immunity statute.

Chairman Celler: Will you supply those?[13]

---

[13] Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 92nd Cong., 1st Sess. (November 10, 1971), pp. 64-65.

A moment later the topic of the recent employ of the grand jury by the government was returned to by Congressman Mikva (Ill.):

> . . . I am not sure the Criminal Division of the Department of Justice is the only one of whom we would have to make that inquiry. I think we would have to get answers from the Internal Security Division, which is a separate division in the Department of Justice; I think it initiates many of those investigations.
>
> Is that correct, Mr. Wood?
>
> Mr. Wood: They have a responsibility in the subversive activity field.
>
> Chairman Celler: I will expect a full answer to those questions, and I will submit them to the subcommittee. If the subcommittee wishes to place them in the record, I will do it.
>
> Mr. Mikva: One last question. Who initiates grand jury investigations of national questions, such as the Ellsberg case concerning the Pentagon papers?
>
> I cannot believe those are decided by local prosecutors, operating ad hoc. I have never known, and I would be very interested in knowing, who makes the decisions, what are the guidelines; is that a decision that comes directly from the Attorney General; if not, from whom?
>
> Mr. Wood: I think probably these questions could better be answered by someone else as to who determines the policy that applies to the particular case.[14]

---

[14] *Id.* at 66. The response of the Department of Justice was simply a letter from Richard G. Kleindienst, Deputy Attorney General, dated November 30, 1971, which set forth in part Department guidelines regarding immunity applications. This letter was reprinted in Hearings Before Subcommittee No. 5, *supra* at pp. 66-68.

As Congressman Celler indicated, there has been an increasing amount of literature critical of the government's conduct in the course of investigations before grand juries. See, e.g., Tigar and Levy, "The Grand Jury As The New Inquisition," 50 Michigan State Bar Journal 693 (November, 1971); Donner and Cerruti, "The Grand Jury Network," *The Nation*, January 3, 1972, pp. 5-20. Of particular relevance here is Diamond, "Fishing In Ellsberg's Wake," *More* (A Journalism Review), January, 1972, pp. 1, 13-16, an article dealing specifically with the grand jury involved in this petition and its counterpart in Boston, Massachusetts.

Research has failed to uncover a single case at all like the instant one. There has been federal immunity legislation in the United States since 1857, but there has never been a case where, after making the decision to forego prosecution of a given individual, and after applying to and actually obtaining from a Court an order compelling a grand jury witness to testify, the government, without consulting the grand jury, has sought to repudiate the immunity application and the Court's order by refusing to allow a willing witness to testify, upon a procedural condition already approved by the Court and from which the government has not appealed. This is, then, a case of first impression.[15]

While unprecedented, and unresolved by this or any Court, the issue here presented is one of substantial significance. Whether the government may be permitted to re-

---

[15] This Court has, of course, undertaken to review cases presenting unprecedented and highly unusual circumstances. See, *e.g.*, *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459 (1947), where certiorari was granted to review the case of a man scheduled a second time to be executed after a mechanical failure had saved him one time from electrocution.

pudiate an immunity application already signed by the district court, for the reason offered in this case or for any other, is a question of considerable importance in view of the extraordinary increase in the government's use of transactional immunity legislation. Counsel are aware of at least 65 occasions since December, 1970, where the government has sought to employ 18 U. S. C. § 2514, the provision involved herein, almost all involving witnesses before grand juries.[16] To give meaning to this figure, the Court should compare it with the use made of 18 U. S. C. §3486, the transactional immunity provision which was Section 2514's predecessor. While the government has sought to use Section 2514 at least 65 times in the last *eighteen months*, it used Section 3486 only *three* times in the first *nine years* after its passage.[17] The issue here presented involves many of the questions and considerations that are arising in these and other cases. The question of the seriousness with which the government should approach an application for an order under Section 2514 and the question of the appropriate limitations upon exe-

---

[16] In Appendix E, pp. 84 *et seq.*, we have listed 42 cases in the last eighteen months where the government has sought to employ Section 2514 and where there has been litigation over the government's attempt to compel a witness to testify. Counsel are also aware of 23 other instances where it has sought to use Section 2514. Most of these were in connection with the grand jury investigation in Harrisburg, Pennsylvania which ultimately lead to the indictment of Father Philip Berrigan, Sister Elizabeth McAlister and others in *United States* v. *Ahmad et al.*, Crim. No. 14950 (M. D. Pa.). The government employed §2514 against at least one person other than Mr. Russo before the grand jury which accused petitioner. This was Linda Sinay, named in the indictment as an unindicted co-conspirator.

[17] "The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope," 72 Yale L. J., 1568, 1608 (1963).

cutive influence and control over grand jury proceedings, the two general issues raised in the instant case, are recurrent ones. The resolution of these issues by this Court is necessary to the proper administration of justice.

## II

**The conduct of the government in this case and the failure of the lower courts to disapprove it are fundamentally at odds with Title 18 U.S.C. Section 2514 and with the federal supervisory power.**

That the instant case arises in the midst of the controversy raging over the government's use of the grand jury is not at all accidental, for it is demonstrative of governmental practices which have fanned that controversy and which should be of concern to this Court.

The wide use of transactional immunity statutes has always met with disfavor. On the one hand, there is the risk of immunizing from prosecution persons who have played a substantial role in criminal activity.[18] On the other hand, providing such immunity does not protect a witness who is thereby compelled to testify from the inherent cruelty of self-accusation, the infamy or disgrace which results therefrom and the attendant civil and economic liabilities. *In re Bart*, 304 F. 2d 631, 634-5 (D. C. Cir., 1962) (unanimous panel included then Circuit Judge, now Chief Justice Burger); *In re Vericker*, 446 F. 2d 244, 247 (2 Cir., 1971); *In re Evans*, 452 F. 2d 1239, 1250

---

[18] The drafters of 18 U.S.C. §3486 noted, for example, that they wished to make sure it would not "become a loophole for the escape from punishment for the guilty." H.R. Rep. No. 2606, 83d Cong. 2d Sess., in 2 U. S. Code Cong. & Admin. News, 83d Cong., 2d Sess., 1954, p. 3062. See also *id.* at 3064 and 3065.

(D. C. Cir., 1971). Nor does it protect against broad revelation of the details of one's private life. See, e.g., *United States* v. *Weinberg*, 439 F. 2d 743 (9 Cir., 1971) (and its companion cases).

The government's practice in regard to use of Section 2514 demonstrates effectively that it has paid scant heed to these considerations. In the instant matter, as in case after case, it has acted seemingly in derogation of them, moving hastily and casually to compel a witness to testify pursuant to Section 2514. We have already noted the tremendous increase in its effort to use Section 2514. The particulars of this effort are equally noteworthy. There are instances where the government has sought to employ §2514 even before the person subpoenaed has appeared before the grand jury.[19] Letters from the Department of Justice authorizing applications for §2514 orders with respect to given individuals are sent before those persons receive their respective subpoenas.[20] Applications are made under §2514 literally on a moment's notice to the witness and immediately after the person first appears before the grand jury,[21] which appearance has often been required remarkably soon after the subpoena is actually served.[22] Frequently, although it is rep-

---

[19] *United States* v. *DiMauro*, 441 F. 2d 428, 440-41 (8 Cir., 1971).

[20] E.g., *In re Vericker*, 446 F. 2d 244 (2 Cir., 1971); *In re Begley*, No. 71-1708 (2 Cir., 1971) (unreported).

[21] See e.g., *United States* v. *Weinberg*, and its four companion cases, 439 F. 2d 743 (9 Cir., 1971); *In re Vericker, supra.*

[22] *Id.* The notice given to petitioner of his appearance before the grand jury (one day) was even more than that given to another witness before this same grand jury. Robert Ellsberg, 15-year old son of petitioner's co-defendant, was served with a subpoena at 7:30 A.M., which subpoena required his appearance before the grand jury at 9:30 A.M. that same morning.

resented that the application is made with the approval of the Attorney General, neither the Court nor the witness is served with the letter of authorization.[23]

The rush continues after the order is signed by the district judge. The witness is frequently returned immediately to the grand jury room where, if he or she refuses to give evidence, for whatever reason or reasons, the government seeks to hold a hearing forthwith to have the witness adjudged in contempt.[24]

In at least two cases, an appellate court has found that in his zeal to use §2514, a government attorney has in effect lied in a sworn affidavit with respect to the true scope of a particular grand jury investigation. See *In re Vericker, supra*, and *In re Begley, supra* (contempt vacated by stipulation upon authority of *Vericker*).[25]

---

[23] Such was the case, for example, with petitioner.

[24] E.g., *In re Vericker, supra; In re Begley, supra; United States* v. *Weinberg, supra* (and its companion cases); *In re Evans, supra* (and its companion case).

[25] Similarly, in a recent case in the same district in which the indictment against petitioner is pending, the government represented in a sworn application for an order pursuant to Section 2514 that it was investigating a possible violation of 18 U.S.C. §2153. This was obviously untrue as §2153, by its own terms, clearly applies only "when the United States is at war, or in times of national emergency as declared by the President or by the Congress." *In re Webb*, No. 72-1782 (9 Cir.) (pending). The only explanation for this misrepresentation was that the government was seeking approval for its application in bad faith. (An immunity application under Section 2514 is proper only when the alleged crime or crimes under investigation is/are enumerated in Section 2516. Section 2153 is such an offense.)

In the instant case, petitioner was served only a day before his subpoena was returnable. When he refused to testify at his initial appearance, the government moved forthwith to confer immunity upon him pursuant to §2514 and, after a brief hearing, the district court signed the §2514 order.[28] When petitioner continued to object to the questions asked him, he was incarcerated for forty-six (46) days, on the government's motion. Finally, when the government succeeded after that time in convincing petitioner to testify, the government turned around and,

---

[28] The grand jury before which petitioner was subpoenaed was convened some time after June 13, the date the *New York Times* began publication of the Pentagon Papers, perhaps as much as nine days later. Mr. Russo was subpoenaed on June 22 and appeared on the 23rd.

It is noteworthy that this series of events occurred contemporaneously with the government's effort to enjoin public dissemination of the Pentagon Papers. The grand jury before which petitioner was questioned was convened in the midst of litigation involving the *New York Times* and the *Washington Post* that was quickly and inexorably being carried to this Court for final resolution. Petitioner's two appearances before the grand jury were the day of the Court of Appeals argument in the *Post* case and the day after appellate argument in the *Times* case. Both Circuits ruled that same day, June 23. *United States* v. *Washington Post*, 446 F. 2d 1327 (D. C. Cir., 1971); *United States* v. *New York Times*, 444 F. 2d 544 (2 Cir., 1971). The argument before Judge Gray on the sufficiency of the government's immunity application was held June 25 (after the judge had already signed the order), the day this Court granted certiorari in both newspaper cases. The indictment against Daniel Ellsberg was returned that same day and released while this Court had the *Times* and *Post* cases under submission. It is not unreasonable to conclude on the basis of the foregoing that the government's hasty effort to compel petitioner to testify was motivated primarily by an effort to return an indictment against Mr. Ellsberg as speedily as possible.

repudiating the application and order obtained under §2514, refused to allow petitioner to testify, because *it* had decided that the District Court's order in regard to providing petitioner with a transcript was unlawful. And all this while it would not appeal that order.

The government's conduct here is thus reflective of the view it has taken and continues to take generally with respect to transactional immunity legislation, a view which permeates the cases cited *supra*. It is that the conferring of immunity upon a witness to compel him to give evidence is a rather unimportant step of no particular consequence. Not only may it be done hastily and without thorough consideration but if the government, for whatever reason, later changes its mind, it may simply ignore the application and the order signed by the district court. In all of this, the witness' rights and obligations are of little concern and can be handled about at the whim of the government.

We submit that this view and the conduct of the government attorney here which reflects that view are fundamentally at odds with the intendment of immunity legislation and with the appropriate functioning of the grand jury. The action of the government violates both a proper construction of §2514 and the federal supervisory power.

The government sought to compel petitioner to forego his Fifth Amendment privilege against self-incrimination at his appearance before the grand jury pursuant to the terms of 18 U.S.C. §2514. The pertinent language of that statute provides that a person ordered by the District Court not to invoke the privilege before the grand

jury[27] "shall [not] be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence . . ."

The government argued before the respondent district judge that a person is "compelled . . . to testify" within the meaning of §2514 only when he actually testifies. We believe this definition wholly untenable. A person is "compelled" when he is under compulsion. Compulsion inheres not in the actual doing of an act, but in the circumstances giving rise to the doing of that act. The government would appear to have confused "compulsion" with "compliance". We believe petitioner was "compelled . . . to testify" pursuant to §2514 from the moment on June 23 when he was ordered to do so by Judge Gray under pain of contempt, and certainly no later than the moment on July 2 when he was adjudged in civil contempt and ordered committed until he would testify. Thus, if, as the government assumed before the District Court, immunity attaches as of the moment a person is "compelled . . . to testify," then clearly Mr. Russo obtained immunity before he was indicted.

---

[27] While a government application under §2514 is sometimes said to be an application for an order compelling the witness to give evidence, this is somewhat misleading. More accurately, it is an application for an order to the witness that he not invoke his privilege against self-incrimination. The statute provides that "upon order of the Court such witness shall not be excused from testifying or from producing books, papers, or other evidence *on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture.*" (Emphasis added) Thus, even after the government obtains a §2514 order, the witness still has the right to invoke constitutional, statutory or common-law rights and privileges other than the Fifth Amendment privilege, as for example, the marital privilege.

Even if it be said that the statute is ambiguous on the question whether immunity attached as of the moment of compulsion, the government can fare no better. While the facial language of §2514 may be of limited utility in resolving the issue here posed, one can say that there is certainly no provision in §2514 for and no indication of a right of the government to repudiate its own statutory application, after the District Court has signed the order. Most importantly, the considerations underlying transactional immunity legislation counsel against creation of such a right.

We have seen that broad use of such provisions are disfavored.[28] The case law repeats and repeats the aversion to "immunity baths."[29] As one Court of Appeals has noted: "Grants of immunity are not lightly to be given, for they may be subject to abuse." *United States* v. *DiMauro*, 441 F. 2d 428, 440 (8 Cir., 1971). The decision to grant a witness immunity from prosecution is one of the most serious judgments by those entrusted with enforcement of the penal law, to be taken only after the most careful and prudent consideration of the interests at stake. To permit the extraordinary grant of immunity to be ordered and approved by the District Court, only to be casually repudiated in the face of the witness' willingness to testify, constitutes a radical departure from the precepts underlying §2514.

Resolution of the issue presented reflects a judgment as to how immunity legislation is to be viewed. The government's position here stands for the view that immunity grants are to be lightly given, compare *United States* v.

---

[28] See pp. 20-21, *supra*.

[29] E.g., *In re Bart*, 304 F. 2d 631, 634 (D. C. Cir., 1962); *In re Evans*, 452 F. 2d 1239, 1250 (D. C. Cir., 1971).

*DiMauro, supra*, for if the government later changes its mind about the grant of immunity, it may repudiate it. Such a view can only encourage hasty, ill-considered or ill-conceived use of transactional immunity provisions such as §2514. On the other hand, rejection of that view will establish emphatically that the granting of immunity is an important and serious step, one not to be taken so lightly by the government that it feels it may later ignore it. If the government is made to suffer the intended consequence of its invocation of §2514, a more cautious and serious approach to the employment of that provision may well be anticipated. Particularly when viewed in light of the "environment from which it cannot be severed," *United States* v. *Mouia*, 317 U. S. 424, 434 (Justice Frankfurter dissenting), the environment of the last eighteen months described *supra*, §2514 must be construed to reject the government's view.

There is a second reason why this Court must disapprove the government conduct in this case. We earlier noted the vast increase in litigation surrounding the grand jury. An important part of that litigation has involved the basic question of whether the grand jury is an independent body acting to protect the citizenry or a passive institution to be maneuvered and exploited by the executive branch it was intended to guard against. There is growing evidence that the independence of the grand jury is currently threatened. So one court has described the government efforts before one grand jury to be nothing more than a "general fishing expedition." *In re Dionisio*, 442 F. 2d 276, 279 (7 Cir., 1971). In a second case, government conduct was held to be "an abuse of the grand jury process," *In re September 1971 Grand Jury*, 454 F. 2d 580, 585 (7 Cir., 1971), where the government sought to use the grand jury as an investigatory tool to perform the job ordinarily assigned to the agencies of

government such as the FBI. In *United States* v. *Doe*, 72 Cr. Misc. 1 (S. D. N. Y., March 7, 1972), a court disapproved a government attempt to use the grand jury to determine a citizen's *civil* tax liability. And see *United States* v. *Ryan*, 455 F. 2d 728 (9 Cir., 1971), discussed *infra* at footnote 33.

The facts of the instant case present still another facet of the same problem. After petitioner had been subpoenaed and after the District Court had ordered him to testify pursuant to §2514, the government attorney decided on his own, without in any way consulting the grand jury, not to allow petitioner to testify upon the condition approved by the District Court. It may be that the grand jury would have been perfectly willing to receive petitioner's testimony and then provide him with a transcript, particularly if informed that the District Court had approved such a procedure.[30] We submit that the action of the U. S. Attorney constituted an improper effort to influence and control the grand jury's proceedings.

From 1681, when two English grand juries resisted interference by the Crown in their consideration of charges against the Earl of Shaftesbury and Stephen College (charges not unlike those pending against petitioner),[31]

---

[30] On October 18, 1971, when he was to testify before the grand jury, petitioner attempted to ascertain what, if anything, the grand jury knew about his proposed testimony upon condition that he receive a transcript and whether it was agreeable to hearing his testimony upon that condition. The government attorney prevented this inquiry. See p. 11, *supra*.

[31] See Judge Kaufman's account of these twin cases in "The Grand Jury—Its Role and Its Powers," 17 F. R. D. 331, 333-334 (1954).

the independence of the grand jury from the executive has been a bulwark of English and American jurisprudence. The reason for this independence is that the grand jury is intended as a *check* upon the government which seeks to bring a prosecution. As this Court said in *Wood* v. *Georgia*, 370 U. S. 375, 390 (1962):

> "Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other; to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." See also *Ex Parte Bain*, 121 U. S. 1, 11-12 (1887).

Because of this we are told that "the grand jury is not meant to be the private tool of a prosecutor." *United States* v. *Fisher*, 455 F. 2d 1101, 1105 (2 Cir., 1972).[32] If this statement is to have any meaning, surely it means that the conduct of the government attorney in unilaterally refusing to allow the grand jury to hear petitioner's testimony was impermissible. It is for the grand jury, not the prosecutor, to determine who its witnesses should be and under what conditions they should appear. See *In re Kelley, et al*, Misc. No. 71-128 (E. D. Mich., 1971) (unreported). To allow the government to control the

---

[32] And see *In re Grand Jury Subpoena*, 225 F. Supp. 923, 925 (N. D. Ill. 1964): "The grand jury contrary to what seems to be the prevailing belief is an integral part of the judicial arm of the government and is not a mere tool of the prosecutor."

grand jury proceedings destroys the very purpose of that institution.[33]

Because the facts here are unprecedented, there are no decisions which are on point. However, in *Hale* v. *Henkel,* 201 U. S. 43, 65 (1906), this Court spoke of the power of the grand jury: "Doubtless abuses of this power may be imagined . . . *But were such abuses called to the attention of the court, it would doubtless be alert to repress them.*" (Emphasis added). It is this general principle with which analysis of the instant case must begin, the acknowledgement by this Court of its responsibility

---

[33] We note that this is not the first time this particular government attorney has misused the institution of the grand jury in this way. In *United States* v. *Ryan,* 455 F. 2d 728 (9 Cir., 1971), the Court noted how he had caused to be issued three grand jury subpoenas without the grand jury even being aware of the fact, nor of subsequent related events: "Several things are noteworthy concerning the procedures in connection with the Robertson Grand Jury. There is no proof that it knew anything about the issuance of the three subpoenas on July 26th, or about the alteration in the return dates, or the service of the subpoenas by Special Agents of I.R.S., or the arrangement for delivery of the subpoenaed documents to the Special Agents, *or the excusing of the witnesses from appearance.*" (Emphasis added) The Court concluded with respect to the effect of what the government attorney had done: "Thus, by means of grand jury subpoenas, the I.R.S. obtained the records which it was unable to secure by an administrative subpoena." *Supra* at 731-732.

We also note that in the course of the instant case, this same government attorney caused to be issued to Bekins Van and Storage of Beverly Hills, California, a grand jury subpoena which sought the production of all property of Mr. Russo's co-defendant, Daniel Ellsberg, held by Bekins. This subpoena, later quashed by the District Court on constitutional grounds, *In the Matter of Motion for Order Quashing Grand Jury Subpoena,* Misc. Cr. No. 2920 (C. D. Cal., 1971), was in fact made returnable at a time the grand jury was not sitting.

and intention to carefully guard against abuse of the grand jury and its process.

Certain analogous cases provide amply authority for rejecting what the government has done here and for implementing the principle of *Hale* v. *Henkel, supra.* Most persuasive perhaps are the decisions dealing with the law of entrapment. The basic opinions of this Court on the subject are *Sorrells* v. *United States,* 287 U. S. 435 (1932) and *Sherman* v. *United States,* 356 U. S. 369 (1958). In each, alternative approaches were raised to support the contention that the petitioners there were, in effect, immune from prosecution. The majority opinions by Chief Justice Hughes and Chief Justice Warren, respectively, rested upon a statutory interpretation. While on its face the penal statute in question could hardly be thought to have addressed the issue of entrapment, the majority read into each what it perceived to be Congressional intent. On the other hand, the concurring opinions (by Justice Roberts in *Sorrells,* joined by Justices Brandeis and Stone; by Justice Frankfurter in *Sherman,* joined by Justices Brennan, Douglas and Harlan) rested upon the federal supervisory power. Similarly, petitioner here urges this Court to disapprove the government's actions on both statutory and supervisory grounds. While, as in *Sorrells* and *Sherman,* the statute in question, §2514, does not expressly address the question at hand, Congressional intent when brought to bear upon a construction of the statute, warrants vindication of petitioner's claim. In *Sorrells* the government argued that a certain act was to be deemed criminal and the defendant having committed such an act, he could be convicted for it. The Court, however, found the issue not so simple, noting that the government's arguments "take no account of the fact that [the statute's] application in the circumstances under con-

sideration is foreign to its purpose . . . But can an application of the statute having such an effect—creating a situation so contrary to the purpose of the law and so inconsistent with its proper enforcement as to invoke such a challenge—fairly be deemed to be within its intendment?" 287 U. S. at 446. We believe application of the same standard here, i.e., whether the government's cavalier use of §2514 is consistent with its proper enforcement and within its intendment, impels the conclusion that petitioner must be deemed to have received immunity under §2514, in the same way Sorrells was deemed not to have violated the statute in his case. And see *Greene* v. *United States*, 454 F. 2d 783 (9 Cir., 1971), which on its facts goes beyond *Sorrells* and *Sherman* in holding the defendants there immune from prosecution because of the government's involvement in their actions.

The arguments in the concurring opinions in *Sorrells* and *Sherman* further support petitioner here. Those opinions, while deeming the respective defendants to have done certain acts, held that because of the government's improper conduct, the defendants were to be treated as if they had not.[34] Conversely, petitioner urges here that while he has not in fact testified, because of the government's conduct (particularly its acting without consulting the grand jury), he should be treated as if he had. In each case, invocation of the supervisory power is war-

---

[34] Several Courts of Appeals have felt free to adopt this supervisory power approach. E.g., *Carbajal-Portillo* v. *United States*, 396 F. 2d 944, 948 (9 Cir., 1968); *United States* v. *Morrison*, 348 F. 2d 1003, 1004 (2 Cir., 1965); *Accardi* v. *United States*, 257 F. 2d 168, 172-3 (5 Cir.), *cert. den.* 358 U. S. 883 (1958).

ranted in order to deter government conduct and to preserve the integrity of the judicial process.[35]

Also persuasive in this regard is the opinion of Chief Judge Bazelon in *Dixon* v. *District of Columbia*, 394 F. 2d 966 (D. C. Cir., 1968), wherein the judge reasons as we do here on an analogous set of facts. In *Dixon*, the appellant was charged with two traffic offenses, admittedly because he went back on an agreement not to file complaints against the arresting policemen. After noting that the government had originally agreed not to prosecute when the appellant had tentatively agreed not to go ahead with his complaint, and attempted to proceed only when the appellant sought to pursue his complaint, Judge Bazelon wrote of "the need to prevent the type of agreement which was attempted in this case," *supra*, at 969, and concluded that the Court should exercise its supervisory power and grant "immunity from prosecution in order to deter blatant Government misconduct." *Id.* at 970. So it is here. The government moved as hastily as possible to procure a §2514 order in order to compel petitioner to testify and then to have him committed when he refused. Petitioner was in fact committed and served more than seven weeks in jail. After all this time, the government's whole purpose in having him committed and maintaining that commitment, i.e., coercing him to give

---

[35] That power of course extends to proceedings before a grand jury because "[t]he grand jury is an arm or agency of the court by which it is appointed. The grand jurors are officers of the court. The United States Attorney, his assistants, the United States Marshal and his deputies and bailiffs, appointed by him to guard their deliberations, and, modernly, the reporters who record their proceedings are likewise officers of the court." *United States* v. *Smyth*, 104 F. Supp. 283, 291-292 (N. D. Cal., 1952). See also *Application of United Electrical, Radio & Machine Workers*, 111 F. Supp. 858, 864 (S. D. N. Y., 1953).

evidence, finally succeeded: petitioner agreed to testify. At this point, the government then proceeded on its own without in any way consulting the grand jury, to refuse to permit petitioner to testify on terms which are entirely lawful and reasonable, because *it* deemed the terms unlawful. We submit that the supervisory power was intended to guard against just such conduct, and all the more so when it is, as we have seen, reflective of recent government conduct in general. Judge Bazelon acted to disapprove the immediate reason for the government's continuing its prosecution of the appellant.[36] Here we ask the Court to disapprove the reason for the government's refusal to allow petitioner to testify upon the condition approved by Judge Ferguson, the act which purportedly allows the government to prosecute petitioner.[37] As in *Dixon*, there is a "need to prevent the type of [conduct] which was attempted in this case." *Op. cit.*

In the lower courts, the government sought to justify the conduct of its attorney on the ground that the District Court's ruling of October 1 was erroneous. We believe that ruling to be eminently correct. Certainly the District Court, which has supervisory power over grand jury proceedings, was empowered to order that petitioner's testimony be conditioned upon his being pro-

---

[36] There are numerous other cases where a criminal defendant has been held immune from prosecution where the reason behind the prosecution is impermissible. E.g., *Duncan* v. *Perez*, 445 F. 2d 551 (5 Cir.), cert. den. 404 U. S. 940 (1971); *McDonald* v. *Musick*, 425 F. 2d 373 (9 Cir., 1970); *United States* v. *McLeod*, 385 F. 2d 734 (5 Cir., 1967).

[37] The discussion of the scope of the immunity to which petitioner is entitled, *infra* at pp. 37-40, demonstrates conclusively that if petitioner had been allowed to testify, the present prosecution would be barred by Section 2514.

vided with a transcript of the testimony which he was, in any event, free to recite or report to the world.[28] Such an order is within the discretion of the court.[29]

More importantly, however, it is not open to the government to question that ruling in this proceeding. In *Walker* v. *Birmingham*, 388 U. S. 307 (1967), this Court held that a person could not attack collaterally an order entered by a trial court but must instead appeal that ruling. Certainly it cannot be contended that, in this regard, the government should be held to a lesser standard than its citizenry. The government's proper forum for challenging Judge Fergason's ruling was by appeal in the normal course (or, perhaps, by mandamus). Since the government failed to seek review of the judge's ruling in the proper way, it cannot be heard to challenge it here.

---

[28] Unlike its limitations on others, Rule 6(e) of the Rules of Criminal Procedure places no strictures upon a witness' use or disclosure of his grand jury testimony.

[29] The government's argument, that it could not provide petitioner with a transcript because the Court had not ordered it to, is, with all respect, specious. The District Judge plainly ruled that if it wanted Mr. Russo's testimony, it would have to provide him with a transcript. Thus, if the government attorney had permitted him to give evidence and had then provided petitioner with the transcript, he would only have been following the law as set forth by the Court and could hardly be thought subject to sanction for doing so.

Nor is *In re Bottari*, 453 F. 2d 370 (1 Cir., 1972), upon which the government relies, to the contrary. The court held only that, on the facts there presented, it was not an abuse of discretion for the district court to have refused to condition the witness' testimony upon receipt of a transcript of it. It did not hold that it would have been an abuse of discretion if the lower court had so conditioned his testimony.

Nor can it challenge the District Court's ruling of November 17 (Appendix C). Its failure to bring that order and opinion to the Court of Appeals in the accepted way likewise bars it from challenging it here. It must also be deemed correct for purpose of this proceeding.

This second ruling by Judge Ferguson, *In re Russo*, Misc. No. 1821 (C. D. Cal., 1971) is persuasive authority for the holding petitioner urges here. The Court held that for purposes of determining liability to commitment for civil contempt, petitioner should be treated as if he had testified. The Court explicitly relied upon Mr. Russo's willingness to give evidence if given a transcript of his testimony and the government's refusal to allow him to give evidence upon that basis. This is precisely the analysis we urge here. Given petitioner's willingness to testify upon the condition already approved by the District Court and given that his not testifying was attributable solely to the government's refusal to comply with that condition, petitioner is entitled to be treated, for purposes of determining transactional immunity, as if he had testified. In each case, petitioner cannot be held accountable for the government's failure to comply with the condition approved by the Court.

Two final points merit emphasis with regard to the question whether petitioner is entitled to transactional immunity. First, whether petitioner's rights under the Fifth Amendment privilege against self-incrimination are violated by the prosecution pending against him has no relevance to the question whether it violates §2514 and the federal supervisory power. Almost thirty years ago this Court settled this precise question in *United States v. Monia*, 317 U. S. 424 (1943). Because the witness there had not invoked the privilege, much less been ordered

to testify, he had not been compelled to testify within the meaning of the Fifth Amendment. On this basis the government argued that he was not entitled to invoke the transactional immunity provision involved. By a vote of 7-2, this Court rejected that suggestion, concluding that a transactional immunity provision might well (and did in that case) afford a witness broader protection than the constitutional provision.

Secondly, the facts of the instant case must be distinguished from the situation where a witness refuses altogether—either unlawfully or lawfully[40]—to give evidence. We may assume that in such a case the witness would not be entitled to transactional immunity. In the instant case, however, the failure of the witness to testify was attributable not to him but to the government which now seeks to deprive him of the immunity he would have if he had testified. This raises the considerations discussed *supra* which do not pertain where the government does nothing to prevent the witness from testifying.

Having established that petitioner is entitled to transactional immunity, it remains to determine what the scope of that immunity is and, particularly, whether it bars the pending prosecution.

At the outset, we note that the existence of transactional immunity is not dependent upon the actual giving of testimony. Transactional immunity is to be distinguished from use immunity in this regard. In the case of the latter, the protection to be afforded is immunity from use of testimony. Obviously, without testimony there can be no im-

[40] After being ordered to testify pursuant to §2514, a witness could still properly refuse to give evidence if to testify would violate a right other than the privilege against self-incrimination, as, for example, the marital privilege.

munity from use of the testimony, since there can be no use of non-existent testimony. Here, however, the immunity is from prosecution based upon the transaction which is the subject matter of the inquiry before the grand jury. Such protection is not dependent upon the giving of testimony.

Secondly, the scope of transactional immunity is not merely determinable from testimony actually given. While the answers given to questions in the grand jury room are one measure of that scope, such answers are not the only measure: the scope of transactional immunity is determinable by the questions as well as the answers.

There can be little question that the transactions which are the subject matter of the charges against petitioner are within the scope of the immunity to which he is entitled. Immunity attaches to transactions which are substantially related to the subject matter of the inquiry before the grand jury. *Heike* v. *United States*, 227 U. S. 131, 144 ((1913); *Lumber Products Assn.* v. *United States*, 144 F. 2d 546, 552-555 (9 Cir., 1944). See also the opinions of Justices Brennan and Douglas (with whom Justice Marshall joined) dissenting from the dismissal of certiorari in *Piccirillo* v. *New York*, 400 U. S. 548, 549-552, 573-574 (1971). A comparison of the charges brought against petitioner with the questions asked petitioner demonstrates that the alleged transactions which form the basis of the charges against Mr. Russo are not merely substantially related to the subject matter of the questions asked him but *are* the subject matter of these questions.

Petitioner was charged by the same special grand jury before which he was questioned with violation of 18 U. S. C. §§641, 793(c), 793(e) and 371 [conspiracy to violate §§641, 793(c), (d) and (e)]. With respect to the conspir-

acy count, the object is said to have included the obtaining from Rand Corporation of classified government documents relating to the national defense. Daniel Ellsberg was named as a co-conspirator and said to have participated in five of the eight overt acts alleged in furtherance of the conspiracy. Lynda Sinay was named as an unindicted co-conspirator and as participant in two of the overt acts alleged. The overt acts include Ellsberg's obtaining various of the Pentagon Papers from Rand Corporation and his bringing papers from Rand in Washington, D. C., to Santa Monica, California; the operating of a Xerox copy machine by Ellsberg, Sinay and petitioner at 8101 Melrose Avenue, Los Angeles, California (which was the address of an advertising agency operated by Sinay); and possession by petitioner of various of the papers. In count 7, petitioner is accused of receiving various of the so-called Pentagon Papers in violation of §641; in count 10 with receiving from Daniel Ellsberg parts of the Pentagon Papers in violation of §793(e). Finally, count 15 charges petitioner with possession of various of the Pentagon Papers in violation of §793(e).

When the government appeared before the District Court on June 23 seeking a §2514 order, both its application for that order and the affidavit in support thereof specifically stated that the grand jury "is presently inquiring into alleged violations of Chapter 37 of Title 18 of the United States Code." Chapter 37 includes 18 U. S. C. §§792-799. A comparison of the questions asked petitioner before the grand jury[41] with the charges against him[42] proves beyond peradventure that the transactions which form the basis of the indictment are precisely those about

---

[41] See pp. 4, 6, *supra*.

[42] Appendix D at pp. 74 *et seq.*

which he was questioned before the grand jury. Thus the immunity to which he is entitled includes immunity from prosecution of that indictment, and it was error for the respondent to deny the motion to dismiss the indictment.

## III

### In view of the extraordinary circumstances here presented, mandamus is an appropriate remedy.

A determination to issue a writ of mandamus involves the dual considerations of power and discretion. See, e.g., *LaBuy* v. *Howes Leather Co.*, 353 U. S. 249, 254, 255 (1957). Does the court have the power to issue the writ and, if so, should it exercise its discretion to do so?

The question of the *power* to issue a writ of mandamus on the facts here presented is resolvable by resort to the All Writs Act, 28 U. S. C. §1651(a), and to the decision in *LaBuy* v. *Howes Leather Co.*, *supra*. The All Writs Act provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

In *LaBuy*, this Court rejected the suggestion that a narrow reading be given to the requirement that the writ be in aid of the jurisdiction of the appellate court. It held that as long as "the Court of Appeals could at some stage of the . . . proceedings entertain [an appeal], it has power in proper circumstances . . . to issue writs of mandamus . . . ." 352 U. S. at 255.[43] Plainly, this standard is satis-

[43] Compare the more restrictive interpretation urged in Justice Brennan's dissenting opinion. 352 U. S. at 260-269.

fied here. If Mr. Russo were to be convicted, he could appeal to the Ninth Circuit to reverse the judgment against him. Thus, "the only real question involved," *id.*, is whether the writ should have issued in the exercise of a sound discretion.[44]

A variety of considerations affect the determination to exercise this discretion. In the instant case many of the

---

[44] Jurisdiction in the Court of Appeals to issue the writ existed even under pre-*LaBuy* law. In *Ex parte Peru*, 318 U. S. 578 (1943), this Court held that it had power to issue a writ of mandamus directing a district court to cease exercising jurisdiction over a proceeding *in rem* brought by a Cuban corporation against a ship owned by Peru on the ground that the vessel was immune from suit, after the district court had refused to dismiss the suit. Similarly, petitioner is here seeking mandamus on the ground of immunity from suit, the District Court having refused to dismiss.

In *In re Josephson*, 218 F. 2d 174, 177-180 (1 Cir., 1954), it was suggested that pre-1948 cases such as *Ex parte Peru, supra*, supporting issuance of a writ of mandamus by this Court could not safely be relied upon by an intermediate court of appeals as authority for the issuance by that court of a writ of mandamus directed to a district court. The reason asserted was that the Court "might have been" exercising power, not under 28 U.S.C. §1651 or its predecessors, but under §234 of the 1911 Judicial Code, derived from §13 of the Judiciary Act of 1789, which empowered this Court *alone* to issue "writs of mandamus, in cases warranted by the principles and usages of law to any courts appointed, or person holding office, under the authority of the United States." This argument was recently examined in detail and rejected by a distinguished panel in the Second Circuit. *United States* v. *Weinstein*, 452 F. 2d 704, 709-713 (2 Cir., 1971) (Chief Judge Friendly, Circuit Judge Kaufman and former Supreme Court Justice Tom Clark). The Court pointed out that the suggestion in *Josephson* failed to take into account the decision in *Ex parte United States*, 287 U. S. 241 (1932), where the Court relied expressly upon §262 of the Code, the forerunner to §1651, see 452 F. 2d at 710, fn. 8, and appears to have been rejected by the decisions of this Court since *Josephson*.

factors that counsel granting the writ of certiorari counsel as well issuance of the writ of mandamus. We believe that *Schlagenhauf* v. *Holder*, 379 U. S. 104 (1964) and *LaBuy* v. *Howes Leather Co.*, *supra*, warrant issuance of the writ here.

In *Schlagenhauf*, the Court held that a writ of mandamus was proper where a petitioner sought to bring before the appellate court an interlocutory order of the District Court which involved "a basic, undecided question." And see *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777, 779 (9 Cir., 1950), where the Court noted that if the district court was in error it would issue a writ of mandamus because the case there involved "an important question of law." Similarly, in *Ex parte Peru*, *supra*, when the question was also immunity from suit,[45] this Court exercised its power to issue the writ in reliance upon the "public importance and exceptional character" of the case. 318 U. S. at 584.[46]

We note that the government has invoked the principle of *Schlagenhauf* in seeking appellate review of a pre-trial disclosure order regarding electronic surveillance. *United States* v. *United States District Court*, 444 F. 2d 651, 654-656 (6 Cir., 1971), cert. granted 29 L. Ed. 2d 708 (1971). The Court of Appeals there held that mandamus was appropriate because "[g]reat issues are at stake," and be-

---

[45] The specific facts of *Ex parte Peru* are set forth in footnote 44.

[46] The only point of contention between the majority in *Peru* and Justice Frankfurter in dissent was not whether mandamus should issue but whether the petitioner should first have sought it in the Court of Appeals rather than proceeding directly to this Court. Both the majority and the dissent assumed that mandamus would properly lie in the intermediate appellate court.

cause "the issue posed . . . is a basic issue which has never been decided at the appellate level by any court." *Id.* at 656-7.

The principle of *Schlageuhauf, United States District Court,* and similar cases is applicable here. The question presented by this petitioner is one of first impression, having never been decided by any court, trial or appellate.[47] Moreover, the issue involved, i.e., when and under what conditions a person ordered to testify pursuant to §2514 is entitled to immunity, is a basic and important one in light of the current widespread use of that provision. See pp. 19-20, *supra.* A decision by this Court at this time would do much to clarify the law on this point, such clarification inuring to the benefit both of the numerous persons being subpoenaed before the grand jury and of the government.

In his concurring opinion in *Will* v. *United States,* 389 U. S. 90, 108 (1967), Justice Black said:

> "I agree that mandamus is an extraordinary remedy which should not be issued except in extraordin-

---

[47] Compare *United States* v. *United States District Court,* where the Court of Appeals acknowledged that although its decision was the first on an appellate level, the issue it was deciding had earlier been passed upon by several district courts. 444 F. 2d at 655-656.

Before respondent, the government cited *Marcus* v. *United States,* 310 F. 2d 143 (3 Cir., 1962), cert. den. 372 U. S. 944 (1963) and *In re Flanagan,* 350 F. 2d 746 (D. Cir., 1965), in support of its position. These, however, were appeals from contempt sentences involving statutes which were self-executing, rather than claim statutes. Most importantly, the dictum in each case certainly did not address itself to the particular facts of this case. At most, each can be read to refer to the instance where (as in each of those cases) a witness refuses, unlawfully, to give evidence, a situation which we have shown, see p. 37, *supra,* is to be distinguished from the instant case.

> ary circumstances. And I also realize that sometimes the granting of mandamus may bring about the review of a case as would an appeal. Yet this does not deprive a court of its power to issue the writ. Where there are extraordinary circumstances, mandamus may be used to review an interlocutory order which is by no means 'final' and thus appealable under federal statutes."

We submit that the circumstances here presented are extraordinary and warrant issuance of the writ. Not only is the question posed one of first impression and one which is important because of the widespread employ of the statute in question, but the resolution of the issue itself turns in large measure upon an understanding of the new and extraordinary use of the grand jury and immunity legislation. The frequent and easy use of Section 2514 and the increasing effort to disturb the independence and function of the grand jury are the problems which lie at the very heart of this case. As we discussed *supra*, these issues have assumed critical importance at the present time because of their continuing recurrence in a large number of cases. This Court should move as rapidly as possible to give guidance on this subject. The instant case is an appropriate vehicle for doing so, involving as it does perhaps the most extreme example of these problems.

In *LaBuy* v. *Howes Leather Co.*, *supra*, this Court, relying upon the federal appellate courts' supervisory control over district courts, 352 U. S. at 259-260, held that mandamus was appropriate in light of a continued disregard of the Federal Rules of Civil Procedure. See *Will* v. *United States*, *supra* at 96. The circumstances here sharply parallel the situation in *LaBuy*. The institution of the grand jury is peculiarly within the supervisory control of the federal appellate courts. *Hale* v. *Henkel*,

*op. cit; United States* v. *Smyth, op. cit.* And as is clearly demonstrated by the facts and cases cited earlier, the conduct of the government here is part of a persistent disregard of the appropriate use of immunity legislation in the grand jury and a disregard of the limitations upon executive influence over grand jury proceedings. Relief by way of mandamus is therefore warranted.

Issuance of the writ is also appropriate in view of the right asserted by petitioner. It is plain that respondent's order is interlocutory and, hence, presently unappealable under 28 U.S.C. §1291. Furthermore, while the ruling of the district judge could be reviewed by appeal after entry of a final judgment, it is well established that the inability of an appellate court to grant adequate relief if it waits to review an issue until after final judgment warrants the issuance of a writ of mandamus. *Ex parte Peru*, 318 U. S. at 584; *Ex parte Fahey*, 332 U. S. 258, 260 (1947); *Ex parte Baldwin*, 291 U. S. 610 (1934). Such is the case here. The right petitioner asserts, made explicit by §2514, is the right not to be *prosecuted*.[48] This must be distinguished from the right not to be *convicted*. If petitioner has the right not to be prosecuted, it is apparent that this Court or the Court of Appeals could not grant petitioner full relief if it were to wait until after final judgment to acknowledge the right Mr. Russo asserts. For reversal on appeal after final judgment can vindicate only the right not to be convicted; the fact of having had to undergo the prosecution remains—unaffected by an appellate reversal of a judgment of conviction. Petitioner will in fact have been denied the right not to be prosecuted. Thus, only if the appellate courts intervene at this stage of the litigation by writ of manda-

[48] The statute provides: "No such witness shall be *prosecuted*. . . ." (emphasis added).

mus can petitioner be afforded the full relief to which he is entitled.

The right to pre-trial intervention to halt a pending prosecution where it is the prosecution itself, unaffected by its result, that violates the statutory or constitutional rights of the defendant is well established. In *Georgia* v. *Rachel,* 384 U. S. 780 (1966), this Court upheld federal removal so as to entirely abort a pending state prosecution where the state defendant had been granted immunity from prosecution by virtue of the 1964 Civil Rights Act. See 384 U. S. at 793-794; see also 384 U. S. at 807 (concurring opinion). In *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965), the Court issued an injunction against a pending state prosecution where denial of First Amendment rights would result "from the fact of the prosecution, unaffected by the prospects of its success or failure." *Supra* at 487. That the prosecution itself would violate the state defendant's rights was sufficient to overcome the traditional rule that his claims should be litigated and could be fully vindicated at the trial and, if necessary, on appeal from any conviction. See also *Dilworth* v. *Riner,* 343 F. 2d 226 (5 Cir., 1965), in which the Court of Appeals for the Fifth Circuit ordered injunctive relief against a pending state criminal proceeding where the prosecution was statutorily prohibited. The theme common to these cases is precisely the principle for which petitioner contends: where a person has immunity from prosecution, it is not enough to allow him to raise that immunity as an issue on appeal from conviction. Since it is the prosecution itself which violates the person's rights, regardless of its outcome, he is entitled to relief from having to go to trial. Because petitioner's rights will be violated by the mere fact of prosecution, he is entitled to relief before trial and issuance of the writ of mandamus is appropriate.

Particularly is this true where, as here, the prosecution lies, in Judge Aldrich's phrase, "in the shadow of the First Amendment." *United States* v. *Spock*, 416 F. 2d 165, 173 (1 Cir., 1969). There is serious doubt whether the statutory authority for the prosecution of petitioner can be sustained—either on its face or as applied to the facts. Cf. *Stanley* v. *Georgia*, 394 U. S. 557, 568, fn. 11 (1969).[49] This Court has recognized that "[a] criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See, e.g., *Smith* v. *California*, 361 U. S. 147 . . ." *Dombrowski* v. *Pfister*, 380 U. S. at 486. It has been observed that "[t]hese freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). Prosecution certainly constitutes a threat of sanction, as envisioned by this Court in *Button*. Prosecution here may itself deter the exercise of First Amendment rights not only by petitioner but, equally important, by others as well.

Furthermore, petitioner faces a lengthy and extraordinarily expensive trial, far longer and more expensive than the vast majority of federal criminal trials. If, as we have urged *supra*, he is immune from that prosecution, he should not be made to undergo the hardships that the trial would entail. In *Ex parte Skinner & Eddy*, 265 U. S. 86 (1924), this Court was faced with a petition for writ of

---

[49] And see *New York Times* v. *United States*, 403 U. S. 713 (1971), where in his dissenting opinion for three justices, Justice Harlan refers to 18 U.S.C. §793(e), one of the statutory props for the prosecution of petitioner, as a "singularly opaque statute." Compare *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961).

mandamus which would direct the Court of Claims to restore an order dismissing an action. In granting the writ the Court said: "It would be a useless waste of time and effort to enforce a trial in the Court of Claims if we were, upon appeal, to find that petitioner was unjustly deprived of his substantial right to dismiss his petition, as we should have to do for the reasons stated." *Id.* at 96. In the instant case, it would be a useless and considerable waste of time, effort and money to enforce a trial in the District Court, if this Court were upon appeal, to find that petitioner was unjustly deprived of his substantial right to dismiss the indictment.[50]

While review by this Court of the order of the Court of Appeals might require a postponement of the trial date for petitioner (but not of Mr. Ellsberg, his co-defendant), we do not believe such a consequence has any bearing on the question whether this Court should undertake that review. One reason is simply that pre-trial review of any case *always* occasions delay. In *LaBuy*, in *Schlagenhauf*, and in numerous other cases, review by this Court of an application for writ of mandamus caused a post-

---

[50] It is sometimes said that the hardships of undergoing a trial leading to a judgment that must be reversed on appeal does not warrant the issuance of mandamus. E.g., *United States Alkali Export Ass'n.* v. *United States*, 325 U. S. 196, 202-203 (1945); *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, 383 (1953). This, however, is not a strict rule. See, e.g., *Schlagenhauf* v. *Holder, supra; LaBuy* v. *Howes Leather Co., supra; Ex parte Skinner & Eddy, supra.. In Gulf Research & Development Co.* v. *Harrison*, 185 F. 2d 457, 459-460 (9 Cir., 1950), the Court of Appeals indicated that "peculiar" hardship would justify issuance of the writ. The cases appear to indicate that while expenditure of money and effort may not in and of itself warrant extraordinary relief, the extent of such a threatened expenditure is a factor to be weighed in the balance with other considerations in determining whether to grant such relief.

ponement of the underlying trial. Nevertheless, this Court granted certiorari in each of those cases.

Secondly, the government's present effort to obtain appellate review by way of mandamus in *United States* v. *United States District Court, op. cit.*, has occasioned a delay of nearly a year and a half in the trial there. Certainly the government cannot be heard to object to a postponement here: any delay would be *de minimus* by comparison.[51]

Finally, the question of trial delay assumes even less importance where, as here, the underlying issue to be resolved is whether petitioner should be tried at all. If petitioner is immune from prosecution then delay becomes an illusory consideration.

---

[51] Indeed, if certiorari were granted, counsel would be prepared to conform to any expedited schedule the Court thought appropriate.

## CONCLUSION

This application is made at a moment in time when the basic issues it raises have assumed extraordinary importance. Given the acknowledgement in *Hale* v. *Henkel*, *supra* at 65, of this Court's obligation and intention to supervise the institution of the grand jury, we ask the Court to grant this petition for a writ of certiorari.

Respectfully submitted,

JAMES REIF
c/o Center for Constitutional Rights
588 Ninth Avenue
New York, New York 10036

LEONARD I. WEINGLASS
108 Washington Street
Newark, New Jersey 07102

JEFFREY B. KUPERS
619 South Bonnie Brae Street
Los Angeles, California 90057

H. PETER YOUNG
1532 Third Street
Santa Monica, California 90401

ARTHUR KINOY
c/o Center for Constitutional Rights
588 Ninth Avenue
New York, New York 10036

*Attorneys for Petitioner*

# APPENDIX A

## Order of Court of Appeals for the Ninth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 72-1765

ANTHONY JOSEPH RUSSO, JR.,

Petitioner,

*vs.*

HON. WM. MATTHEW BYRNE, JR., United States District Judge for the Central District of California,

Before: MERRILL and GOODWIN, Circuit Judges

Writ of mandamus is denied.

# APPENDIX B

## Oral Opinion of the United States District Court for the Central District of California

* * *

The Court: Thank you, Mr. Balaban.

Gentlemen, this matter was well briefed, incidentally, and well argued.

I think the question really turns on whether immunity attached, and that really affects both of the issues, I think, that were raised.

I find that under the provisions of Section 2514 of Title 18 that the immunity procedure is basically as follows, and I might say that neither of you really argued the language of this section—you did brief it—which to me seems to be the really key factor.

The United States Attorney under this statute, upon the approval of the Attorney General, makes an application to the Court that a witness be instructed to testify pursuant to the provisions of that section, not that he just be ordered to testify but that the testimony be pursuant to the provisions of that section.

If the Court accepts the application, the witness is then ordered to testify and he shall not be excused from testifying on the grounds that the testimony may tend to incriminate him. Judge Gray gave that order. The order does not talk about immunity other than the fact that it was on application from the government, and the order says that:

> "Anthony Russo, Jr. appear forthwith before the grand jury and testify and produce evidence with respect to all matters upon inquiry by the grand jury."

*Appendix B*

At that time the previous questions that have been asked in the grand jury room really have no bearing on the immunity grant. The immunity grant could be made without ever asking the witness a question in the grand jury room. The government may bring him down and make an application for a grant of immunity prior to the time that he has taken the Fifth Amendment.

That was not the case here, as the witness did refuse to testify on the grounds of the Fifth Amendment.

After the order is made, then there are two options that can occur. If the witness doesn't testify pursuant to the order, then he is held in contempt for violation of the order, having nothing to do with his Fifth Amendment rights because his testimony, if he gave it under the order, would be pursuant to the section, that is, Section 2514.

If he does testify under the order, then the section again applies, and as he does testify the section provides two types of immunity, the first type being the transactional type of immunity, which prohibits him from ever being prosecuted for any transaction, matter or thing that he testifies about. The second immunity that attaches is that the testimony that he gives under this compulsion cannot be used as evidence against him in any criminal proceeding.

The language, I think, of the statute is somewhat clear. After saying that the Court will order the witness to testify, the statute then says:

> "No such witness"—

that is, the ordered witness—

> "shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction,

> matter or thing concerning which he is compelled to testify; nor shall testimony so compelled be used as evidence in any criminal proceeding."

I feel the language of that section, particularly taken in light of the language in several cases, provides that the immunity attaches at the time that the testimony is given and that the scope of the immunity is determined by the testimony that is given.

Thus the scope of the immunity in the transactional part of the section would be determined by any transaction matter, or thing, as the statute says, that the witness did testify to, so as to whether Mr. Russo is immunized and thus the prosecution is in violation of Section 2514, I find against the defendant Mr. Russo and find that he is not so immunized and that the prosecution is not in violation of the terms of that section.

As to the arguments made by the defense under the third-party beneficiary contract theory, detrimental reliance and twice in jeopardy, those arguments that have been categorized as more equitable arguments, I do not find. I think the only real issue there is whether Judge Ferguson, in his order when purging a contempt, also immunized or excused Mr. Russo from any subsequent indictment, and I find that the Judge did not, nor did he intend to, that his order really, from the rather clear language of it, pertained to the punishment or penalties that Mr. Russo could possibly sustain as a result of the contempt proceedings for his refusal to so testify, so the defendant's motion to dismiss the indictment pursuant to Rule 12 is denied.

* * *

# APPENDIX C

**Opinion in *In re Russo*, Misc. No. 1821 (C. D. Cal., 1971)**

IN THE
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MISC. No. 1821 (WF)

---

*In the Matter of:*

ANTHONY RUSSO, JR.
Witness Before the Grand Jury

---

The issue presented by this proceeding is whether the court has the power to purge a grand jury witness of civil contempt of court upon his promise to testify upon the condition that he be furnished a transcript of his testimony.

The contempt proceedings involving the witness are reported in *Anthony Russo, Jr.* v. *United States*, —— F. 2d —— (No. 71-2046, 9th Cir. August 17, 1971). In summary:

> (1) The government began an investigation and presented evidence before a grand jury of this district in regard to possible violations of Title 18 of the United States Code.
>
> (2) As a result of those investigations, Daniel Ellsberg was indicted relative to documents pertain-

ing to the involvement of the United States in Southeast Asia, which documents have been referred to as the Pentagon Papers. *See New York Times Co.* v. *United States*, 403 U. S. 713 (1971).

(3) On June 23, 1971, Anthony Russo, Jr. was subpoenaed to appear and testify before the grand jury. He refused, claiming the privilege against self-incrimination. The government then filed an application with the court to grant him immunity pursuant to 18 U. S. C. § 2514.

(4) The court granted immunity, but Mr. Russo nevertheless refused to testify. He was then brought before the court and ordered to answer the questions the jury had asked. When he refused, the court adjudged him in civil contempt, and committed him to the custody of the Attorney General until such time as he purged himself of that contempt.

(5) The order of contempt was affirmed by the Court of Appeals for the Ninth Circuit on August 17, 1971. *Russo* v. *United States, supra.* He was then committed to custody.

(6) On October 1, 1971, Mr. Russo filed a motion for an order (a) to require the government to record and transcribe all matters occurring before the grand jury while he was before it; (b) to require the government to furnish him with a copy of the transcript of his testimony; and (c) to prohibit the government from taking any action against him on account of any disclosures the witness may make regarding any matters which may occur in his presence before the grand jury.

(7) At the conclusion of the hearing, the court ordered that conditioned upon the government's furnishing Mr. Russo with a copy of his testimony, he will have purged himself of contempt of court if he appeared before the grand jury on October 18, 1971, and answered all questions put to him.

(8) On October 18, 1971, the witness appeared before the grand jury ready to answer questions. However, the attorney for the Department of Justice informed him that the government would not furnish him with a transcript of his testimony.

(9) The parties then appeared before the court and the government moved the court to vacate the condition that a copy of the transcript of the witness' testimony be furnished to him.

The government's request is in effect a motion for a finding that the witness has not purged himself of civil contempt of court. The motion is denied and the court finds that Mr. Russo has purged himself.

The motion raises two questions. The first is the power and propriety of this court to require that the testimony of Mr. Russo be recorded and transcribed. The second is the power to purge the witness of civil contempt of court by accepting his promise to testify if he is furnished a transcript of his testimony.

In regard to the first question, Rule 6(d) of the Federal Rules of Criminal Procedure states that "for the purpose of taking evidence, a stenographer or operator of a recording device may be present while the grand jury is in session", except while the jury is deliberating or voting.

That rule along with Rule 6(e), relating to disclosure of matters occurring before the grand jury, unquestionably empower this court to require all or any part of grand jury proceedings to be recorded and transcribed, with the exception of jury deliberations and voting. *See United States* v. *Thoresen,* 428 F. 2d 654 (9th Cir. 1970); *Herzog* v. *United States,* 226 F. 2d 561, 566 (9th Cir. 1955), *cert. denied,* 352 U. S. 844 (1956).

The rule in the Ninth Circuit is that the recording or transcribing of grand jury testimony is permissible, not mandatory. *United States* v. *Thoresen, supra; Loux* v. *United States,* 389 F. 2d 911, 916 (1968). Because the testimony before a grand jury may have a substantial effect upon the rights and interests of those who appear before it and those indicted by it, this rule has come under heavy attack from many courts and commentators who contend that the recording of grand jury proceedings should be made mandatory. *See, e.g.,* ABA Special Committee on Federal Rules of Procedure, 38 F.R.D. 95, 106; 8 J. Moore, *Federal Practice* ¶6.02[2] at 11 (2nd ed 1970); *United States* v. *Gramolini,* 301 F. Supp. 39 (D. R. I. 1969). While no circuit has yet gone this far, several have held that the better procedure is to record and transcribe grand jury testimony. *United States* v. *Aloisio,* 440 F. 2d 705, 708 (7th Cir. 1971) (appeal pending); *United States* v. *Hensley,* 374 F. 2d 341, 352 (6th Cir. 1967), *cert. denied,* 389 U. S. 923, *reh. denied,* 389 U. S. 891; *United States* v. *Cianchetti,* 315 F. 2d 584, 591 (2nd Cir. 1963). This circuit recently observed:

> "Where a defendant, anticipating future grand jury proceedings involving himself, gives notice in advance that he will seek a transcript of the proceeding if an indictment is returned and offers to pay

> the expense of having a reporter in attendance or shows inability to pay, a sound exercise of discretion would ordinarily call for the granting of a motion that a reporter be in attendance." *United States* v. *Thoresen, supra* at 666.

Although *Thoresen* referred to a request by a "defendant" that the grand jury proceedings be recorded, the holding cannot be limited in that regard. In that case, the first indictment returned against the defendants was dismissed when the statute upon which a portion of the indictment was based was held unconstitutional by the Supreme Court. Anticipating further grand jury proceedings, the defendants moved the court for an order compelling the presence of a court reporter at any subsequent grand jury proceedings involving them. The district court's denial of this motion prompted the above-quoted comment in the circuit court.

The defendants in *Thoresen*, therefore, were in the unique situation of being substantially certain that they would be the subject of future grand jury proceedings and that they would be indicted. It was in this sense that the circuit court referred to them as "defendants". In the instant case, Mr. Russo is not a defendant; indeed, he has been granted immunity. Nevertheless, his activities and those of his associates, are under scrutiny by the grand jury. It is impossible at this point in the proceedings to be certain what Mr. Russo's testimony may reveal, what further information this grand jury may discover, or what effect these proceedings may ultimately have upon the rights and interests of Mr. Russo. It would be folly to assume that his substantial rights may not be jeopardized by a subsequent turn of events. The grand jury in question is investigating a wide range of activity, and its in-

quiries are being coordinated with those of other grand juries around the country. The record suggests that the government has undertaken a very broad investigation without knowing how long it may extend. It is essential, therefore, that the record of the jury be preserved. For these reasons, this court holds that Mr. Russo has as much interest in a recording of his grand jury testimony as did the defendants in *Thoresen*. Although Mr. Russo has not offered to pay the expense of having a reporter in attendance, or to pay for the transcript, the government has not made his ability to pay an issue. If it subequently becomes an issue, the matter can be resolved in appropriate proceedings.

Therefore, Mr. Russo's motion that a reporter be present when he testifies is entirely proper, and this court hereby reaffirms its prior order granting that motion. Since the government states that it intends to have a reporter present in any case, this order certainly places no additional burden on it.

The government contends that providing a witness with a transcript of his testimony will invade the secrecy of grand jury proceedings and diminish the effectiveness of the grand jury as an institution. In order to assess this argument, it is necessary to examine the history of the grand jury and its traditions of secrecy.

The institution of the grand jury is deeply rooted in English history. Many authorities regard the Assize of Clarendon, issued by Henry II in 1166, as the origin of the modern criminal grand jury. *See, e.g.*, 1 Holdsworth, *A History of English Law* 312-27 (6th ed. 1938); 1 Stephen, *A History of the Criminal Law of England* 184-86, 250-58 (1883). That decree provided for a body of twelve men in each county, to be summoned by the Crown, whose

function was to report to the King's officials persons who, according to public knowledge, were suspected of crimes. At its inception, therefore, the grand jury functioned solely to augment the centralized power of the Crown by acting as public prosecutor to ferret out crime in the counties.

As the grand jury became an established institution, it gradually developed independence of action from the Crown. This was accomplished by enclosing its proceedings in a veil of secrecy which the Crown was unable to penetrate. The body adopted the practice of hearing witnesses in private, rather than in open court. Representatives of the Crown were not permitted in the room while the jury examined the witnesses and deliberated. Simultaneously, the custom of the Crown's judges to examine the jurors on their findings was discontinued. *See* Edwards, *The Grand Jury* (1906). The jurors themselves swore on oath of secrecy which contained no reservation in favor of the government. They were enjoined "the king's counsel, your fellows, and your own, you shall keep secret". 8 Wigmore, *Evidence* § 2360, at 728 (McNaughton rev. 1961).

The true independence of the grand jury, made possible by the institution of secrecy, was realized in 1681 in the *Trial of Stephen College*, 8 How. St. Tr. 549, 550 (1681), and the *Earl of Shaftesbury's Trial*, 8 How. St. Tr. 759, 771-74 (1681). Each of these men was accused by the Crown of high treason. At the insistence of the King's counsel, the grand juries were required to hear the witnesses in open court. After doing so, the jury in each case demanded and was granted the opportunity to examine the witnesses again in private and to deliberate in private. In each case the jury then refused to indict.

Edwards, *supra* at 28-30. These two cases are celebrated as establishing the grand jury as a bulwark against the oppression and despotism of the Crown.

Thus, it is important to note that the common law concept of grand jury secrecy developed from a need to protect the jurors and the accused from the tyranny of the Crown. Secrecy insulated the jurors from the pressures of the Crown and permitted the grand jury to guard the people against the oppressive power of autocratic government.

The grand jury was brought to this country without significant change. The experience under British rule instilled in the colonists a healthy distrust of the power of centralized government. Consequently, they provided in the Fifth Amendment that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." This provision was felt necessary to secure the liberties of the citizens against arbitrary encroachment by the government. *Ex parte Bain*, 121 U. S. 1, 12 (1887); *Hurtado v. California*, 110 U. S. 516, 538-58 (1884) (dissenting opinion). Here, too, secrecy was found necessary to this function. The most celebrated example of grand jury independence in this country is the case of *Peter Zenger* in 1734. In that case, two New York grand juries, resisting heavy pressure by the colonial governor, refused to return an indictment of criminal libel for an attack upon the colonial governor. Note, *The Grand Jury as an Investigatory Body*, 74 Harv. L. Rev. 590, 590-91 (1961).

Over the years, as fear of the oppressive power of the government has subsided, the government prosecutor has regained substantial influence over the grand jury and,

consequently, that institution has lost much of its former independence. *See* 8 J. Moore, *Federal Practice* ¶6.02[1]. The grand jury now relies upon the prosecutor to initiate and prepare criminal cases and investigations which come before it. The government attorney is present while the jury hears testimony; he calls and questions the witnesses and he draws the indictment. The only remnant of secrecy with respect to the government which adheres today is the practice of conducting the actual deliberations and voting of the jury in private. However, the prosecutor's influence may be felt even then. *United States* v. *Gramolini, supra* at 41.

In addition to permitting the grand jury a measure of independence, the institution of grand jury secrecy serves other purposes which were propounded at least as early as the *Earl of Shaftesbury's Trial, supra,* in 1681. See 8 Wigmore, *Evidence* § 2360, at 729. Formulated at a time when the grand jury was struggling to free itself from domination by the Crown, one may speculate whether these justifications were designed to obscure the real purpose of secrecy. Whatever may have been their original motivation, the following justifications for grand jury secrecy are now generally recognized by the courts:

> (1) The grand jurors themselves are to be free from the apprehension that their opinions and votes may be subsequently disclosed by compulsion.
>
> (2) The complainants and the witnesses summoned are to be free from the apprehension that their testimony may be subsequently disclosed by compulsion, and this in order that the state may secure willing witnesses.
>
> (3) The guilty accused is not to be provided with such clues as will enable him to flee from arrest

or to suborn false testimony or tamper with witnesses.

(4) The innocent accused, who is charged by complaint before the jury but is exonerated by their refusal to indict, is entitled to be protected from the compulsory disclosure of the fact that he has been groundlessly accused. 8 Wigmore, Evidence § 2360, at 734-35. *See also United States* v. *Proctor & Gamble Co.*, 356 U. S. 677, 681 n.6 (1958).

The question then is the extent to which providing a witness with a transcript of his own grand jury testimony would be inconsistent with valid reasons for secrecy. In approaching this question, it must be remembered that the policy of grand jury secrecy should be maintained to the full extent necessary to fulfill the ends of justice, and no further. *Atwell* v. *United States*, 162 F. 97, 100 (4th Cir. 1908).

Unlike the jurors themselves, witnesses before grand juries were not sworn to secrecy at common law, but were bound to refrain from disclosure. *Regina* v. *Hughes*, 1 Car. & K. 519, 174 Eng. Rep. 919 (N. P. 1844); 1 J. Chitty, *The Criminal Law* 317 (5th Am. ed. 1847). The rule in this country is not uniform. In 1946, when the Federal Rules of Criminal Procedure were adopted, only two states, Missouri and Texas, required by statute an oath of secrecy of witnesses. Several states required such an oath as a matter of practice, while still others imposed no obligation of secrecy upon witnesses. *Compare People* v. *Naughton*, 38 How. Prac. 430 (N. Y. 1870) and *State* v. *Fish*, 90 N. J. L. 17, 100 A. 181 (1917), *rev'd on other grounds*, 91 N. J. L. 228, 102 A. 378 (no obligation of secrecy), with *State* v. *Kemp*, 124 Conn. 639,

1 A. 2d 761 (1938) (requiring oath of secrecy). In the federal courts, no act of Congress imposed an obligation of secrecy on grand jury witnesses and the majority of districts required no oath of secrecy. However, in approximately 33 of the 85 district courts at that time witnesses were required to take such an oath. *See* Federal Rules of Criminal Procedure, Second Preliminary Draft, Note to Rule 6 (1944); *see also Goodman* v. *United States*, 108 F. 2d 516 (9th Cir. 1939).

The Advisory Committee to the Supreme Court, which drafted the Federal Rules of Criminal Procedure, considered the justifications for imposing secrecy upon grand jury witnesses and determined that such secrecy was not necessary. As adopted in 1946, Rule 6(e) read in pertinent part:

> "(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule."

*Appendix C*

The Committee Notes to Rule 6(e) state:

> "2. The rule does not impose any obligation of secrecy on witnesses. The existing practice on this point varies among the districts. The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate."

Witnesses before all federal grand juries, therefore, have been free since 1946 to disclose what transpired during their presence in the grand jury room. *See In the Matter of Petition for Disclosure of Evidence before October, 1959 Grand Jury,* 184 F. Supp. 38 (E. D. Va. 1960); *In the Matter of Hearings before Committee on Banking and Currency of the United States Senate,* 19 F. R. D. 410 (N. D. Ill. 1956), *rev'd on other grounds,* 245 F. 2d 667 (7th Cir. 1957). *But see United States* v. *Smyth,* 104 F. Supp. 279, 280 n.5 (N. D. Cal. 1952); *United States* v. *Owen,* 11 F. R. D. 371, 373 (W. D. Mo. 1951). There is no evidence that this breach of secrecy has diminished the effectiveness of the grand jury system or adversely affected the ability of the government to investigate crime and bring offenders to justice. Rule 6(e) has been reexamined as recently as 1966. In that year the rule was amended by adding "the operator of a recording device" and "any typist who transcribes recorded testimony" to the list of persons bound by the obligation of secrecy. The fact that it was not felt necessary so to bind witnesses, after twenty years' experience without such an obligation, is further testimony to the success of the rule.

The absence of criticism of Rule 6(e) is easily explained. An examination of the justifications for the

policy of grand jury secrecy demonstrates that requiring secrecy of witnesses would serve no purpose. Of the justifications hereinbefore quoted, the first is inapposite. Permitting a witness to disclose his testimony does not interfere with the jurors' ability to deliberate and vote in secrecy. The second justification, that secrecy frees the witness from the apprehension that his testimony may be disclosed and encourages full disclosure by the witness, is most important. Professor Wigmore contends that the nondisclosure of a witness' testimony is a privilege of the witness himself. 8 Wigmore, *Evidence* § 2362. The privilege is not the grand juror's "for he is merely an indifferent mouthpiece of the disclosure"; nor is it the government's, for "the state's interest is merely the motive for constituting the privilege". "[T]he *privilege*", he concludes, "must therefore be *that of the witness*, and rests upon his consent." Wigmore, *supra* at 736. Rule 6(e) is entirely consistent with this position. It permits the witness—and only the witness—to disclose the content of his testimony, at least until an indictment has issued or justice otherwise requires disclosure.

The third justification is that secrecy will prevent the guilty accused from fleeing before an indictment has issued, suborning false testimony or tampering with witnesses. Persuasive though this argument may initially appear, it is of little moment within the framework of the issues presented in this proceeding. As a witness may disclose all he knows anyway, furnishing him with an accurate transcript of his testimony cannot possibly affect the justification. The last justification is perhaps hardest to dispel, for the protection of the innocent accused is the cornerstone of our system of criminal jus-

tice. However, this court must infer from the absence of criticism of Rule 6(e) over its twenty-five year history that the innocent accused has not suffered under this rule. In large measure, this is undoubtedly attributable to the effectiveness of the government's investigatory process and to the tremendous influence the government prosecutor exerts over the grand jury. In recent history, federal grand juries have seldom, if ever, refused to indict.

A witness before a grand jury, then, is not presently bound to secrecy in any regard. This court can conceive of no reason why furnishing a witness a written transcript of his testimony should interfere with the valid functions of the grand jury any more than does the existing practice. The provision of a transcript does not weigh differently on the justifications for secrecy than the present rule. In addition, providing a transcript will further the interests of justice and benefit the grand jury and the witness. As the Advisory Committee noted, every witness is entitled to relate the proceedings to his attorney. Indeed, this is essential to safeguard the witness' rights and interests. A written transcript will insure that the attorney is provided an accurate record of the proceedings. Further, the existence of a written transcript would minimize the possibility of the witness' publicizing false information regarding the grand jury proceedings, a possibility which bothered government counsel in this case.

In addition, a review of a written transcript would give the witness and his attorney or associate an opportunity to correct errors in the transcription or inadvertent mistakes in the testimony itself. Any attorney who has ever undertaken the laborious process of deposing witnesses

knows how errors and mistakes creep into the reporter's transcript. Any trial judge who has had to determine motions to correct transcripts knows that mistakes are made and how vitally important it is that they be corrected immediately when the testimony is still fresh in the minds of the court, counsel and witnesses. A witness who has been granted immunity is still subject to perjury, and in such a prosecution willingness to correct a misstatement is relevant to the issue of intent. *United States* v. *Lococo*, —— F. 2d —— n.2 (No. 26,336, 9th Cir. Sept. 27, 1971). The need of a witness for the transcript of his testimony before a grand jury, therefore, is real and founded upon a pragmatic regard for his protection. In short, providing the witness with a written transcript shortly after he testifies will insure an accurate record of the proceedings and will maximize the usefulness of the witness' testimony.

It is important to note that providing a witness a transcript does not force him to divulge the contents of his testimony. Under existing practice, the witness may voluntarily disclose the substance of his testimony to whomever he chooses—his attorney, an associate, the person under investigation, or the news media. On the other hand, he need make no such disclosure if he so prefers. The courts will not require such disclosure absent a showing of "compelling necessity". *Arlington Glass Co.* v. *Pittsburgh Plate Glass Company*, 24 F. R. D. 50, 52 (N. D. Ill. 1959). The availability of a transcript does not affect these options. The witness is free to keep the transcript confidential or reveal it.

It is the conclusion of this court, therefore, that furnishing a grand jury witness a transcript of his testimony shortly after his appearance is not inconsistent

with valid reasons for grand jury secrecy and will not diminish the effectiveness of the grand jury system or interfere with governmental efforts to investigate crime.

The government next contends that it is improper for this court to order that a transcript be provided Mr. Russo because the disclosure is not "preliminarily to or in connection with a judicial proceeding", as provided in Rule 6(e). The government has misconstrued the order of the court. The court has not ordered the government to furnish the witness a transcript. The order under consideration merely purged Mr. Russo of civil contempt. Therefore, it is not necessary in the context of this case to determine whether a grand jury witness is involved in a "judicial proceeding".

The government further argues that a grand jury witness must show a "particularized need" to obtain a transcript. The "particularized need" test was formulated by the Supreme Court in *United States v. Procter & Gamble Co.*, 356 U. S. 677 (1958). In that case the government brought civil suit following a federal grand jury investigation of possible criminal violations of the antitrust laws in which no indictment was returned. The trial court granted a motion by the company for discovery of the entire grand jury transcript. The Supreme Court reversed, holding that the company had not shown sufficient "compelling necessity" or "particularized need" to overcome the "indispensable secrecy of grand jury proceedings". 356 U. S. at 682. The Court relied heavily upon on justification of the rule of secrecy: "[T]o encourage all witnesses to step forward and testify freely without fear of retaliation." 356 U. S. at 682. As hereinbefore discussed, providing a witness a transcript of his own testimony is not inconsistent with this policy.

Nor is it inconsistent with other justifications there recognized by the Court. *See United States* v. *Proctor & Gamble Co.*, 356 U. S. at 681 n.6. Accordingly, this court finds that a witness need make no showing of "compelling necessity" or "particularized need" to be entitled to a written transcript of his testimony. He must show only that his testimony was recorded and a transcript can be made.

This position is not inconsistent with Rule 16(a)(3) of the Federal Rules of Criminal Procedure. Under that rule, which went into effect July 1, 1966, a district court "[u]pon motion of a defendant . . . may . . . permit the defendant to inspect and copy or photograph any relevant . . . (3) recorded testimony of the defendant before a grand jury". Although this rule vests some discretion in the court whether to permit such discovery, it has generally been held that the defendant is entitled as a matter of right to a copy of his own testimony before the grand jury, unless the government affirmatively establishes a substantial reason why it should be withheld. *United States* v. *Manetti*, 323 F. Supp. 683, 693 (D. Del. 1971); *United States* v. *Projansky*, 44 F. R. D. 550, 558 (S. D. N. Y. 1968); 8 J. Moore, *Federal Practice* §16.05[2]; *see also United States* v. *Cook*, 432 F. 2d 1093 (7th Cir. 1970), *cert. denied*, 401 U. S. 996 (1971).

It cannot be doubted that this court has the power both to hold a witness in contempt for refusing to testify before a grand jury and to purge the witness of contempt when it is satisfied that the dignity of the court has been restored. The grand jury is subject to substantial supervision and control by the court. As the Supreme Court observed in *Brown* v. *United States*, 359 U. S. 41, 49 (1959):

*Appendix C*

> "A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so."

Congress has not made refusal to testify a specific offense. Refusal to testify is an affront to the court, and it is for the court to determine the punishment and the cure. The power to punish for contempt is inherent in all courts. *Ex parte Robinson*, 86 U. S. (19 Wall.) 505 (1873). Contempt is punishable because of the necessity of maintaining respect toward the court. The power to punish for contempt is exercised to vindicate the court's dignity for disrespect shown to it or to compel the performance of an order. *See Penfield Co.* v. *Securities & Exchange Commission*, 330 U. S. 585, 593 (1947), *reh. denied*, 331 U. S. 865. The very nature of contempt permits the court the broadest discretion to determine the circumstances in which the interests of the court and the public have been disregarded and to determine what conduct by the contemnor is required to vindicate those interests. As stated by the Supreme Court in *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 193 (1949): "We are dealing here with the power of a court to grant the relief that is necessary to effect compliance with its decree. The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief. They may entail the doing of a variety of acts . . . ." *See also Penfield Co.* v. *Securities*

*& Exchange Commission, supra; Gompers* v. *Bucks S. & R. Co.*, 221 U. S. 418 (1911); *Oriel* v. *Russell*, 278 U. S. 358, 364-65 (1929).

In the instant case, Mr. Russo was subpoenaed by the court to testify before the grand jury. He refused to testify and was found in civil contempt for refusing to obey the order of court to answer questions. The court's order was that Mr. Russo would be held in custody until such time as he purged himself of contempt. This court now holds that Mr. Russo has purged himself of that contempt by his promise to testify before the grand jury conditioned upon being furnished a written transcript of his testimony within thirty-six hours of his appearance. He is held immune from all penalties by reason of refusing to testify as a witness before a grand jury unless the government agrees that it will furnish him a copy of the transcript of his testimony.

IT IS FURTHER ORDERED that the clerk this date shall serve copies of this memorandum opinion and order by United States mail upon the attorneys for the parties appearing in this matter.

Dated this 17th day of November, 1971.

WARREN J. FERGUSON
United States District Judge

# APPENDIX D

**Counts 1, 7, 10 and 15 in Indictment in *United States* v. *Anthony Joseph Russo, Jr. and Daniel Ellsberg*, No. 9373 (C. D. Cal.)**

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

March 1971 Grand Jury

---

UNITED STATES OF AMERICA,

Plaintiff,

*v.*

ANTHONY JOSEPH RUSSO, JR., DANIEL ELLSBERG,

Defendants.

---

[18 U. S. C. §371: Conspiracy;

18 U.S.C. §641: Stealing Government Property; Concealing Stolen Government Property; Unauthorized Conveying of Government Property; Receiving Stolen Government Property;

18 U.S.C. §793(c): Receiving National Defense Documents;

18 U.S.C. §793(d)(e): Communicating National Defense Documents;

18 U.S.C. §793(e): Retaining National Defense Documents.]

*Appendix D*

The Grand Jury charges:

COUNT ONE

[18 U.S.C. §371]

Commencing about March 1, 1969, and continuing to about September 30, 1970, defendants Anthony Joseph Russo and Daniel Ellsberg, and unindicted co-conspirators Vu Van Thai, Lynda Sinay, and others unknown to the grand jury, agreed, confederated and conspired together:

(1) to defraud the United States and an agency thereof by impairing, obstructing, and defeating its lawful governmental function of controlling the dissemination of classified Government studies, reports, memoranda and communications; and

(2) to commit offenses against the United States as follows:

(a) to embezzle, steal and knowingly convert to their own use and the use of others, and without authority to convey and dispose of classified Government studies, reports, memoranda and communications which were things of value of the United States of a value in excess of $100; and to receive, conceal, and retain said classified Government studies, reports, memoranda and communications with intent to convert them to their own use and gain, knowing them to have been embezzled, stolen, and converted, in violation of Title 18, United States Code, Section 641;

(b) to receive, obtain, and attempt to receive and obtain documents and writings connected with the national defense for the purpose of obtaining information respecting the national defense, and with knowledge and rea-

son to believe that said documents and writings would be disposed of contrary to the provisions of Title 18, United States Code, Sections 793(d) and (e), by their communication, delivery and transmittal to persons not entitled to receive them, in violation of Title 18, United States Code, Section 793(e);

(c) willfully to communicate, deliver, transmit, and attempt to communicate, deliver and transmit documents and writings relating to the national defense, which defendants would have in their lawful and unauthorized possession, to persons not entitled to receive them, in violation of Title 18, United States Code, Section 793(d) and (e);

(d) willfully to retain documents and writings relating to the national defense which would be in defendants' unauthorized possession, and to fail to deliver them to the officer or employee of the United States entitled to receive them, in violation of Title 18, United States Code, Section 793(e).

The objects of the conspiracy were as follows: defendants would obtain and cause to be obtained, classified Government documents relating to the national defense, from Rand Corporation, Santa Monica, California, and Washington, D. C., and from other sources. The documents would be communicated, delivered and transmitted to defendants and others, none of whom would be authorized to receive them. Defendants and their co-conspirators would retain the documents, copy them, and communicate them to persons not entitled to receive them.

To effect the objects of the conspiracy, defendants committed various overt acts in the Central District of California, including the following:

*Appendix D*

1. On or about March 4, 1969, defendant Ellsberg brought ten volumes of a 38-volume Department of Defense study entitled "United States-Vietnam Relations 1945-1967" to Los Angeles County, California, from Rand Corporation, Washington, D. C.

2. On or about April 7, 1969, defendant Ellsberg obtained from Rand Corporation, Santa Monica, California, Part II of a memorandum entitled "Negotiations and Vietnam: A Case Study of the 1954 Geneva Conference."

3. On or about August 29, 1969, defendant Ellsberg brought eight volumes of a 38-volume Department of Defense study entitled "United States-Vietnam Relations 1945-1967" to Los Angeles County, California, from Rand Corporation, Washington, D. C.

4. On or about October 3, 1969, defendant Ellsberg obtained from Rand Corporation, Santa Monica, California, a document consisting of pages 1, 2, 3, 4, 9, 12, 13 and 14 of a memorandum dated 27 February 1968, entitled "Report of Chairman, JCS on Situation in Vietnam and MACV Force Requirements."

5. On or about October 4, 1969, defendants Ellsberg and Russo, and co-conspirator Sinay operated a Xerox copy machine at 8101 Melrose Avenue, Los Angeles, California.

6. On or about October 19, 1969, co-conspirator Vu Van Thai possessed one volume of a 38-volume Department of Defense study entitled "United States-Vietnam Relations 1945-1967," namely volume VI C.4, entitled "Set-

tlement of the Conflict, *Negotiations, 1967-1968,* History of Contacts."

7. During the period from about March 4, 1969, to about May 20, 1970, defendant Russo possessed the following:

(1) Nine volumes of a 38-volume Department of Defense study entitled "United States-Vietnam Relations 1945-1967":

| *Volume* | *Title* |
|---|---|
| I | Vietnam and the United States—*1940-1950.* |
| IV.A.2. | Aid for France in Indochina—*1950-1954.* |
| IV.B.5. | Evolution of the War—*The Overthrow of Ngo Dinh Diem—May-November, 1963.* |
| IV.C.4. | Evolution of the War—Marine Combat Units Go to Da Nang—*March 1965.* |
| IV.C.5. | Phase I in the Build-Up of U. S. Forces—The Debate—*March-July 1965.* |
| IV.C.8. | Re-emphasis on Pacification: *1965-1967.* |
| IV.C.9(a) | Evolution of the War—*US/GVN Relations: 1963-1967.* |
| IV.C.9(b) | Evolution of the War—*US/GVN Relations: 1963-1967*—Part II. |
| VI.C.4. | Settlement of the Conflict—*Negotiations, 1967-1968*—History of Contacts. |

(2) Pages 1, 2, 3, 4, 9, 12, 13 and 14 of a memorandum dated 27 February 1968, entitled "Report of Chairman, JCS On Situation in Vietnam and MACV Force Requirements."

8. On or about October 1, 1969, co-conspirator Lynda Sinay possessed one volume of a 38-volume Department of Defense study entitled "United States-Vietnam Relations 1945-1967", namely volume IV.C.9(b) entitled "Evolution of the War—*US/GVN Relations: 1963-1967*—Part II."

COUNT SEVEN

[18 U.S.C. §641]

During the period from about March 4, 1969, to about May 20, 1970, in Los Angeles County, within the Central District of California, defendant Anthony Joseph Russo did receive the following things of value of the United States and a department and agency thereof, with intent to convert them to his own use and gain, knowing them to have been embezzled, stolen and converted:

(1) Nine volumes of a 38-volume Department of Defense study entitled "United States-Vietnam Relations 1945-1967":

| *Volume* | *Title* |
|---|---|
| I | Vietnam and the United States—*1940-1950.* |
| IV.A.2. | Aid for France in Indochina—*1950-1954.* |
| IV.B.5. | Evolution of the War—*The Overthrow of Ngo Dinh Diem—May-November, 1963.* |
| IV.C.4. | Evolution of the War—Marine Combat Units Go to Da Nang—*March 1965.* |
| IV.C.5. | Phase I in the Build-Up of U. S. Forces—The Debate—*March-July 1965.* |
| IV.C.8. | Re-emphasis on Pacification: *1965-1967.* |
| IV.C.9(a) | Evolution of the War—*US/GVN Relations: 1963-1967.* |

*Appendix D*

| *Volume* | *Title* |
|---|---|
| IV.C.9(b) | Evolution of the War—*US/GVN Relations: 1963-1967*—Part II. |
| VI.C.4. | Settlement of the Conflict—*Negotiations, 1967-1968*—History of Contacts. |

(2) Pages 1, 2, 3, 4, 9, 12, 13 and 14 of a memorandum dated 27 February 1968, entitled "Report of Chairman, JCS On Situation in Vietnam and MACV Force Requirements"; which things had a value in excess of $100;

In violation of Title 18, United States Code, Section 641

COUNT TEN

[18 U.S.C. §793(e)]

During the period from about March 4, 1969, to about May 20, 1970, in Los Angeles County, within the Central District of California, defendant Anthony Joseph Russo, for the purpose of obtaining information respecting the national defense, received and obtained from Daniel Ellsberg documents connected with the national defense, consisting of:

(1) Nine volumes of a 38-volume Department of Defense study entitled "United States-Vietnam Relations 1945-1967":

| *Volume* | *Title* |
|---|---|
| I | Vietnam and the United States—*1940-1950.* |
| IV.A.2. | Aid for France in Indochina—*1950-1954.* |
| IV.B.5. | Evolution of the War—*The Overthrow of Ngo Dinh Diem—May-November, 1963.* |

*Appendix D*

| *Volume* | *Title* |
|---|---|
| IV.C.4. | Evolution of the War—Marine Combat Units Go to Da Nang—*March 1965.* |
| IV.C.5. | Phase I in the Build-Up of U. S. Forces—The Debate—*March-July 1965.* |
| IV.C.8. | Re-emphasis on Pacification: *1965-1967.* |
| IV.C.9(a) | Evolution of the War—*US/GVN Relations: 1963-1967.* |
| IV.C.9(b) | Evolution of the War—*US/GVN Relations: 1963-1967*—Part II. |
| VI.C.4. | Settlement of the Conflict—*Negotiations, 1967-1968*—History of Contacts. |

(2) Pages 1, 2, 3, 4, 9, 12, 13 and 14 of a memorandum dated 27 February 1968, entitled "Report of Chairman, JCS On Situation in Vietnam and MACV Force Requirement," knowing and having reason to believe at the time he received and obtained them that said documents would be obtained and disposed of contrary to the provisions of Title 18, United States Code, Section 793 (d) and (e);

In violation of Title 18, United States Code, Section 793(e).

COUNT FIFTEEN

[18 U.S.C. §793(e)]

During the period from about March 4, 1969, to about May 20, 1970, in Los Angeles County, within the Central District of California, defendant Anthony Joseph Russo, having unauthorized possession of, access to, and

control over documents relating to the national defense consisting of:

(1) Nine volumes of a 38-volume Department of Defense study entitled "United States-Vietnam Relations 1945-1967":

| *Volume* | *Title* |
|---|---|
| I | Vietnam and the United States—*1940-1950.* |
| IV.A.2. | Aid for France in Indochina—*1950-1954.* |
| IV.B.5. | Evolution of the War—*The Overthrow of Ngo Dinh Diem—May-November, 1963.* |
| IV.C.4. | Evolution of the War—Marine Combat Units Go to Da Nang—*March 1965.* |
| IV.C.5. | Phase I in the Build-Up of U. S. Forces—The Debate—*March-July 1965.* |
| IV.C.8. | Re-emphasis on Pacification: *1965-1967.* |
| IV.C.9(a) | Evolution of the War—*US/GVN Relations: 1963-1967.* |
| IV.C.9(b) | Evolution of the War—*US/GVN Relations: 1963-1967*—Part II. |
| VI.C.4. | Settlement of the Conflict—*Negotiations, 1967-1968*—History of Contacts. |

(2) Pages 1, 2, 3, 4, 9, 12, 13 and 14 of a memorandum dated 27 February 1968, entitled "Report of Chairman, JCS On Situation in Vietnam and MACV Force Requirements"; did willfully retain said documents and fail to deliver them to the officer or employee of the United States entitled to receive them;

*Appendix D*

In violation of Title 18, United States Code, Section 793(e).

A True Bill

PATRICIA L. JONES
Foreman

DAVID R. NISSEN
Special Assistant U. S. Attorney
Attorney for the Government

## APPENDIX E

**Cases, Since December, 1970, Involving Government Use of 18 U.S.C. §2514**

*United States* v. *Weinberg*, 439 F. 2d 743 (9 Cir., 1971)

*United States* v. *Scheffler*, 439 F. 2d 743 (9 Cir., 1971)

*United States* v. *Volpin*, 439 F. 2d 743 (9 Cir., 1971)

*United States* v. *Duncan*, 439 F. 2d 743 (9 Cir., 1971)

*United States* v. *Donaldson*, 439 F. 2d 743 (9 Cir., 1971)

*United States* v. *Puntillo*, 440 F. 2d 540 (7 Cir., 1971)

*United States* v. *DiMauro*, 441 F. 2d 428 (8 Cir., 1971)

*United States* v. *Jones*, 441 F. 2d 428 (8 Cir., 1971)

*United States* v. *Sirian*, 441 F. 2d 428 (8 Cir., 1971)

*In re Egan*, 450 F. 2d 199 (3 Cir., 1971) (*en banc*), cert. granted 404 U. S. 990 (1971)

*In re Grand Jury Investigation*, 444 F. 2d 499 (3 Cir., 1971) (*en banc*)

*United States* v. *George*, 444 F. 2d 310 (6 Cir., 1971)

*In re Walsh*, 450 F. 2d 231 (3 Cir., 1971), cert. granted 404 U. S. 990 (1971)

*In re Brown*, 329 F. Supp. 422 (S. D. Ia., 1971)

*In re Vericker*, 446 F. 2d 244 (2 Cir., 1971)

*In re Evans*, 452 F. 2d 1239 (D. C. Cir., 1971)

*United States* v. *Fishlowitz*, 452 F. 2d 1239 (D. C. Cir., 1971)

*Appendix E*

*In re Russo*, 448 F. 2d 369 (9 Cir., 1971)

*Olsen* v. *United States*, 446 F. 2d 912 (9 Cir., 1971)

*Reed* v. *United States*, 448 F. 2d 1276 (9 Cir., 1971)

*In re Reno*, 331 F. Supp. 507 (E. D. Mich., 1971)

*In re Calandra*, 332 F. Supp. 737 (N. D. Ohio, 1971)

*LaTona* v. *United States*, 449 F. 2d 121 (8 Cir., 1971)

*In re Begley*, No. 71-1708 (2 Cir., 1971)

*United States* v. *Reynolds*, 449 F. 2d 1347 (9 Cir., 1971)

*In re Womack*, 333 F. Supp. 479 (N. D. Ill., 1971)

*In re Robinson*, 333 F. Supp. 479 (N. D. Ill., 1971)

*In re Stavins*, No. 71-201 (D. Mass., 1971)

*In re Marx*, 451 F. 2d 466 (1 Cir., 1971)

*Fraser* v. *United States*, 452 F. 2d 616 (7 Cir., 1971)

*In re Patricia Grumbles*, 453 F. 2d 119 (3 Cir., 1971)

*In re Donald Grumbles*, 453 F. 2d 119 (3 Cir., 1971)

*In re Bottari*, 453 F. 2d 370 (1 Cir., 1972)

*In re Patricia Rom, Jane Hoover, Mary Elizabeth Sandel*, Misc. No. 14950 (M. D. Pa.), *app. dism.* No. 72-1084 (3 Cir., 1972)

*United States* v. *Duncan*, No. 72-1146 (9 Cir., 1972)

*In re Horn*, No. 72-1160 (3 Cir., 1972)

*United States* v. *John Doe*, Samuel L. Popkin, Appellant, No. 72-1090 (1 Cir., 1972)

*United States* v. *Neiberger and Taube*, No. 71-1880 (6 Cir., 1972)

*In re Webb*, No. 72-1782 (9 Cir.) (pending)

## Certificate of Service

This is to certify that three (3) copies of the aforegoing petition for writ of certiorari have been served by certified mail upon Hon. Wm. Matthew Byrne, Jr., United States District Judge, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012, respondent, and upon the office of the Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, counsel for the real party in interest, this 19th day of May, 1972.

JAMES REIF
(Co-counsel for Petitioner)

SUPREME COURT, U. S.
FILED
JUN 8 1972
MICHAEL RODAK, JR., CLERK

LIBRARY
SUPREME COURT, U. S.

No. 71-1513

# In the Supreme Court of the United States

OCTOBER TERM, 1971

ANTHONY JOSEPH RUSSO, JR., PETITIONER

*v.*

HON. WM. MATTHEW BYRNE, JR., JUDGE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
*Solicitor General.*
A. WILLIAM OLSON,
*Acting Assistant Attorney General.*
ROBERT L. KEUCH,
WILLIAM M. PLATT,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Questions presented | 1 |
| Statute involved | 2 |
| Statement | 3 |
| Argument | 6 |
| Conclusion | 10 |


CITATIONS

Cases:


| | |
|---|---|
| *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 | 9 |
| *Doe* v. *Rosenberry*, 255 F. 2d 118 | 6 |
| *Grand Jury Investigation of Giancana, In re*, 352 F. 2d 921, certiorari denied, 382 U.S. 959 | 7 |
| *Kastigar* v. *United States*, No. 70-117, decided May 22, 1972 | 8 |
| *Murphy* v. *Waterfront Commission*, 378 U.S. 52 | 7 |
| *Parr* v. *United States*, 351 U.S. 513 | 9 |
| *Roche* v. *Evaporated Milk Association*, 319 U.S. 21 | 9 |
| *Russo, In re*, 448 F. 2d 369, stay of mandate denied *sub nom. Russo* v. *United States*, 404 U.S. 1209 | 4 |
| *Schlagenhauf* v. *Holder*, 379 U.S. 104 | 10 |
| *United States* v. *Dooling*, 406 F. 2d 192, certiorari denied, 395 U.S. 911 | 9 |
| *Will* v. *United States*, 389 U.S. 90 | 9, 10 |

Statutes and Rule:


| | Page |
|---|---|
| 18 U.S.C. 371 | 5 |
| 18 U.S.C. 641 | 5 |
| 18 U.S.C. 793(c) | 5 |
| 18 U.S.C. 793(e) | 5 |
| 18 U.S.C. 1826(a)(2) | 3 |
| 18 U.S.C. 2514 | 2, 3, 5, 6, 7 |
| Rule 6(e), Fed. R. Cr. P | 6, 8 |

# In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1513

ANTHONY JOSEPH RUSSO, JR., PETITIONER

*v.*

HON. WILLIAM MATTHEW BYRNE, JR., JUDGE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The order of the court of appeals (Pet. App. A) was entered without opinion. The oral opinion of the district court (Pet. App. B) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on May 9, 1972. The petition for a writ of certiorari was filed on May 19, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether petitioner, who had been granted transactional immunity with respect to any testimony he might give before a federal grand jury, can invoke

that immunity to bar the present prosecution if he did not subsequently appear before the grand jury and testify.

2. Whether the extraordinary writ of mandamus is appropriate for the interlocutory review sought at this stage in the proceedings.

## STATUTE INVOLVED

Section 2514 of Title 18, United States Code (82 Stat. 216), provides:

> Whenever in the judgment of a United States Attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination,

> to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

## STATEMENT

The essential facts are not in dispute. On June 22, 1971, petitioner was served with a subpoena, ordering him to appear the next day and testify before a special federal grand jury in Los Angeles, California, which was investigating possible violations of federal law in connection with the public disclosure of the "Pentagon Papers." Petitioner appeared but declined to answer questions, asserting his privilege against self-incrimination under the Fifth Amendment (Pet. 4).

The government thereupon made application under 18 U.S.C. 2514 to the United States District Court for the Central District of California for an order instructing petitioner, in exchange for a grant of immunity with respect to "any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify * * *", to appear before the grand jury and answer questions. Following a hearing, the application was granted. Petitioner then went before the grand jury a second time, but he again refused to testify. The government moved the district court to hold petitioner in civil contempt under 18 U.S.C. 1826(a)(2),

and, following a hearing on July 2, 1971, it did so. The court of appeals affirmed. See *In re Russo,* 448 F. 2d 369 (C.A. 9), stay of mandate denied *sub nom. Russo* v. *United States,* 404 U.S. 1209. On August 16, 1971, petitioner was committed to custody until the term of the grand jury expired or he agreed to testify, whichever occurred first.

On September 27, 1971, petitioner offered to testify on the conditions that his testimony be transcribed (Pet. 7), that he be provided with a complete written transcript thereof "within 24 hours after each appearance" (Pet. 8), and that he be permitted freely to disclose whatever occurred during his appearance (*ibid.*). Following a hearing on October 1, 1971, the district court essentially accepted petitioner's terms;[1] it ordered that he could purge himself of contempt by appearing on October 18, 1971, and testifying before the grand jury; he was thereupon released from custody.

On the designated date, petitioner appeared outside the grand jury room. He was advised by the government attorney that since the government considered unlawful the district court order requiring production of the grand jury transcript within 36 hours after each appearance,[2] petitioner's appearance would

[1] The court ordered that the grand jury proceedings be recorded, that petitioner be provided a transcript thereof within 36 hours after his appearance, and that petitioner be permitted to show the transcript to others and orally disclose what occurred in the grand jury. There could, however, be "no commercialization of the transcript" (Pet. 9).

[2] On October 5, 1971, the government had served on petitioner a formal "Notice" of its objection to this aspect of the court order (Pet. 10).

be requested only if he agreed to testify without a transcript. Petitioner refused, and the government then moved the district court to vacate its October 1 order requiring immediate disclosure. On November 17, 1971, the court reaffirmed its previous order conditioning petitioner's grand jury testimony upon his receipt of a transcript; it further ruled that, in view of the government decision not to compel the testimony of petitioner under such circumstances, he was deemed to have purged himself of contempt (Pet. App. C).[3]

Thereafter, on December 29, 1971, the grand jury returned an indictment against Daniel Ellsberg and petitioner (Pet. App. D), charging the latter with violating 18 U.S.C. 371, 641, 793(c) and 793(e).[4] On January 14, 1972, petitioner moved in the United States District Court for the Central District of California for a dismissal of the charges against him on the ground that prosecution was barred by the court's earlier grant of transactional immunity under 18 U.S.C. 2514. Judge Byrne denied the motion on January 28, 1972. On May 3, 1972, petitioner applied to the court of appeals for a writ of mandamus directing Judge Byrne to dismiss the indictment. The court

[3] On December 29, 1971, the government filed a notice of appeal from both the October 1 order and the November 17 order (Pet. 12). The question relating to disclosure of the grand jury transcript, however, became unimportant with the government's decision not to compel petitioner to testify before the grand jury; accordingly, the appeal was never perfected.

[4] The indictment superseded an earlier indictment against Daniel Ellsberg, returned on June 25, 1971, which charged Ellsberg with violations of 18 U.S.C. 641 and 793. Petitioner had not been named in the earlier indictment.

of appeals denied such relief without opinion (Pet. App. A).

## ARGUMENT

1. Petitioner contends here, as he did below, that the district court's grant of transactional immunity under 18 U.S.C. 2514 bars his subsequent indictment. We disagree.

Following his refusal under the Fifth Amendment to testify before the grand jury, petitioner was granted immunity with respect to "any transaction, matter or thing concerning which he is compelled * * * to testify * * *" (18 U.S.C. 2514). Thereafter, he persisted in his refusal to answer questions and was adjudged in civil contempt. After spending a little over one month in jail, he offered to testify on the condition, *inter alia*, that he promptly be provided a transcript of his appearance. When the district court ordered such disclosure, however, the government objected on the ground that the 36-hour limit within which to furnish petitioner with his transcript copy was unlawful.[5] It determined not to seek petitioner's grand jury testimony on such a condition.[6]

[5] Rule 6(e), Fed. R. Crim. P., permits a court to direct disclosure of a grand jury transcript only "preliminary to or in connection with a judicial proceeding * * *." At the time that the court entered its order, petitioner was not involved in any judicial proceeding. Indeed, the present indictment was not returned against him until December 29, 1971, more than two months later. See *Doe* v. *Rosenberry*, 255 F. 2d 118, 120 (C.A. 2).

[6] Petitioner was held to have "purged himself of [civil] contempt by his promise to testify before the grand jury conditioned upon being furnished a written transcript of his testimony within thirty-six hours of his appearance" (Pet. App. C, p. 73).

Consequently, petitioner gave no testimony before the grand jury. He is, therefore, now in no position to invoke the statutory immunity of 18 U.S.C. 2514. As the district court correctly observed (Pet. App. B, p. 54), "the language of that section * * * provides that the immunity attaches at the time that the testimony is given and * * * the scope of the immunity is determined by the testimony that is given." And see *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 79–80; *In re Grand Jury Investigation of Giancana*, 352 F. 2d 921, 925 (C.A. 7), certiorari denied, 382 U.S. 959.

Petitioner's position seems to be that he is entitled to protection from prosecution because "the failure of the witness to testify was attributable not to him but to the government" (Pet. 37). He does not seriously dispute that, had the present indictment been returned earlier, while he was in jail for civil contempt, the district court's grant of Section 2514 immunity would have afforded him no protection (Pet. 37). Rather, he contends (Pet. 36) that, given his "willingness to testify upon the condition already approved by the District Court and given that his not testifying was attributable solely to the government's refusal to comply with that condition, [he] is entitled to be treated, for purposes of determining transactional immunity, as if he had testified."

The immunity statute, however, while it requires that the United States Attorney filing an application thereunder first make a judgment that the witness' testimony "is necessary to the public interest," does not prohibit the government, once the immunity appli-

cation receives court approval, from thereafter declining for appropriate reasons to compel such testimony. "An immunity statute * * * creates a framework in which the prosecuting attorney can make a calm and reasoned decision whether to compel testimony and suffer the resulting ban on prosecution, or to forego the testimony." *Kastigar* v. *United States,* No. 70–117, decided May 22, 1972, slip op. 5 (Mr. Justice Marshall, dissenting).

Here, the government decided to forego questioning petitioner before the grand jury, but not, as petitioner intimates (Pet. 27), because of a change of mind about the public importance of his testimony.[7] Rather the decision was based on a considered judgment that the transcript-disclosure requirement subsequently imposed by the district court as a condition to compelling petitioner's testimony was unlawful (see n. 5 *supra*). Whether or not that legal conclusion is correct, the validity of the condition is sufficiently questionable under Rule 6(e), Fed.R.Crim.P., that the government cannot be faulted for declining to take petitioner's grand jury testimony in the face of the 36-hour disclosure requirement. There is thus no cause for treating petitioner for present purposes as if he had testified.[8]

[7] Whether this would have been a permissible ground for not taking petitioner's testimony once he had been given transactional immunity is not presented in this case.

[8] We cannot agree with petitioner that the government's refusal to insist on his testimony violated the district court's order for transcription and disclosure. As we have already pointed out, that order merely imposed upon the government certain conditions if it compelled petitioner to testify (Pet. 8–10). By electing not to do so, however, the government was not obliged

2. At all events, the district court's interlocutory order denying petitioner's motion to dismiss the present indictment does not warrant resort to the extraordinary writ of mandamus. As this Court reaffirmed not too long ago in *Will* v. *United States,* 389 U.S. 90, 95, quoting *Roche* v. *Evaporated Milk Association,* 319 U.S. 21, 26, mandamus jurisdiction "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" Thus "it is clear," the Court observed (389 U.S. at 95), "that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."

The present dismissal order is concededly not an action by the district court that it was powerless to take. The claim here is simply that the court "erred in ruling on matters within [its] jurisdiction." *Parr* v. *United States,* 351 U.S. 513, 520. Thus, even assuming *arguendo* that the district court so erred—which we dispute—there is no cause here for issuance of the extraordinary writ of mandamus. See, *e.g., Will* v. *United States, supra; Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379; and compare *United States* v. *Dooling,* 406 F. 2d 192, 198 (C.A. 2), certiorari denied, 395 U.S. 911.

---

under the court order to meet those conditions. Moreover, since the district court specifically held (Pet. App. C) that petitioner, by indicating a willingness to testify if he were promptly provided a transcript, had purged himself of contempt, he has not been in any way prejudiced by the government's ultimate decision.

Moreover, as pointed out in *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110, "the writ [of mandamus] is not to be used as a substitute for appeal * * * even though hardship may result from delay and perhaps unnecessary trial * * *." It is undisputed that the interlocutory dismissal order involved here can "be reviewed by appeal after entry of a final judgment" (Pet. 45). "All our jurisprudence is strongly colored by the notion that appellate review should be postponed, except in narrowly defined circumstances, until after final judgment has been rendered by the trial court." *Will* v. *United States, supra*, 389 U.S. at 96. There are, we submit, no exceptional circumstances presented in this petition to warrant a departure from that general policy of deferral.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

A. WILLIAM OLSON,
*Acting Assistant Attorney General.*

ROBERT L. KEUCH,
WILLIAM M. PIATT,
*Attorneys.*

JUNE 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972